IN THE

Supreme Court of the United States

OCTOBER TERM, 1925—No. 10.

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA.

PETITION FOR REHEARING.

GALLO & ACKERMAN, INC., 107 Liberty St. and 6 Church St., N. Y.

In the

Supreme Court of the United States

October Term, 1925—No. 10.

Charlotte Anita Whitney,
Plaintiff-in-Error,

against

The People of the State of California,
Defendant-in-Error.

In Error to the District Court of Appeal, First Appellate District, Division One, State of California.

PETITION FOR REHEARING.

Plaintiff-in-error petitions for a rehearing of her cause upon the following ground:

That in dismissing her cause "for want of jurisdiction upon the authority of Section 237 of the Judicial Code as amended by the Act of September 6, 1916, c. 448, sec. 2, 39 Stat., 726," this court acted under a misapprehension of the facts and

erroneously doubted the accuracy of the statement contained in the order (Record, page 337) of the District Court of Appeal, First Appellate District, Division 1, of the State of California, dated December 9, 1924, which said order was part of the record of said cause in this court, and which amended the record by inserting therein the following statement:

> "The question whether the California Criminal Syndicalism Act (Statutes 1919, page 281) and its application in this case is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property, without due process of law, and that all persons shall be accorded the equal protection of the laws, was considered and passed upon by this Court."

This order and the stipulation upon which it was entered did not constitute an attempt to confer jurisdiction upon this court by consent. On the contrary, the stipulation and order stated the actual facts concerning the raising of the aforesaid Federal questions in the California District Court of Appeal, and the stipulation was entered into and the order was made for the purpose of enabling these actual facts to appear in the record.

The raising of these Federal questions in the District Court of Appeal is shown by the briefs submitted in that court in behalf of plaintiff-in-error. Copies of these briefs (omitting passages

which are wholly immaterial and italicizing those which are for the present purpose most important) are submitted herewith in an appendix separately printed, as Exhibits A, B and C, being respectively plaintiff-in-error's opening, closing and supplemental briefs submitted to that Court.

These briefs are submitted not as being in themselves parts of the record (which of course they are not [*Zadig* vs. *Baldwin*, 166 U. S., 485]), but as establishing the complete accuracy of the statement in the order—which *is* a part of the record—that the issues of Federal constitutional law were raised in the California District Court of Appeal and there decided against plaintiff-in-error. Counsel for plaintiff-in-error pressed these claims of Federal Constitutional right in the California District Court of Appeal even though "conscious of the fact that in passing upon an application for a writ of prohibition the Supreme Court of the State of California had rendered an opinion stating—'We see no merit in the claim that the act under which petitioner is being prosecuted is invalid as being in violation of the federal and state constitution.'" (See Appendix, page XXXI; the reference is to *Whitney* vs. *Superior Court*, 182 Cal., 114.)

(1) At page 19 of plaintiff-in-error's closing brief in the California District Court of Appeal (Exhibit B, page XXXII), appears the following:

> "Appellant respectfully urges that the Criminal Syndicalism Law of the State of

> California, as it stands, is violative of the Fourteenth Amendment to the Constitution of the United States."

(2) In the pages immediately following (see pages 19-28 of closing brief, Exhibit B, pages XXXII-XLVII) the statute's violation of the equal protection clause of the Fourteenth Amendment by reason of its unjust discrimination between those who oppose and those who favor change in industrial ownership is argued (with copious references to authorities—see especially quotations from the opinions in *American Sugar Refining Co.* vs. *MacFarland*, 229 Fed., 284, at page 25 of closing brief, Exh. B, page XLI and in *re VanHorn*, 70 Atl., 986, at page 26 of closing brief, Exh. B, page XLIV—where the equal protection clause of the Fourteenth Amendment is specifically mentioned).

(3) Continuing the claim of protection under the Fourteenth Amendment, plaintiff-in-error raised the specific constitutional objection of vagueness in the following words at page 28 of closing brief (Exhibit B, page XLVII):

> "Again the Statute is open to constitutional objection on the ground that its terms are vague and not susceptible of definition."

This necessarily raised a due process question (Compare *U. S.* vs. *Cohen Grocery Co.*, 255 U. S., 81, page 89; see also *International Harvester Co.* vs. *Kentucky*, 234 U. S., 216).

(4) Plaintiff-in-error's claim that the California Criminal Syndicalism Law violates the constitutional right of freedom of speech, assembly, etc., was made in her opening brief in the California District Court of Appeal (see pages 39-40, 2-3 of opening brief, Exh. A, pages XIX, II), and again in her closing brief (pages 17, 29 of closing brief, Exh. B, pages XXX, XLVIII). These rights are protected by the due process clause of the Fourteenth Amendment of the Constitution of the United States (*Gitlow* vs. *U. S.*, 45 Sup. Ct., 625).

This Court has held that a specific reference to the particular section of the Constitution which is violated is not necessary (*Clyde* vs. *Gilchrist*, 262 U. S., 94, 97), nor indeed any reference in terms to the Constitution of the United States provided the objection taken is by its very nature one arising under the Constitution of the United States (*Spencer* vs. *Merchant*, 125 U. S., 345, page 352). (That there is no need of formality in raising the Federal question, see *Murray* vs. *Charleston*, 96 U. S., 432, page 442.)

(5) The question of the violation of the most fundamental principles of due process by the conviction of plaintiff-in-error, without her or her counsel's being informed of the exact nature of the accusation against her and without protection against double jeopardy, was repeatedly raised (opening brief, pages 11-13, Exh. A, pages III-IV; pages 26-28, Exh. A, pages XVII-XVIII; pages 15-16, Exh. A, pages VII-VIII; page 23, Exh. A, page XIV; supplemental brief, pages 5-6, Exh. C, page LV). At page 12 of the opening

brief (Exh. A, page IV), specific reference is made to the *Constitutional* right of every accused to be informed of the nature of the accusation against him.*

This analysis shows not only that issues of Federal constitutional right were in fact urged upon the California court, but that these issues were urged with surprising insistence, vigor and variety of attack. As late as 1922 this court itself in a dictum (*Prudential Insurance Co.* vs. *Cheek*, 259 U. S., 530, 538) denied that freedom of speech was protected by the Fourteenth Amendment, a position only corrected in *Gitlow* vs. *New York* (45 Sup. Ct., 625, decided in 1925).

In the brief submitted by plaintiff-in-error in this Court all of these points were argued (Points I, V, VI, VII, VIII, IX) and additional arguments were adduced supporting plaintiff-in-error's contention that the statute as applied in her case violated the due process clause of the Fourteenth Amendment. Upon the authority of *Dewey* vs. *Des Moines* (173 U. S., 193, at page 198) parties are not confined to the same arguments advanced in the Courts below upon the federal questions involved.

The question whether the California Criminal Syndicalism Act and its application in this case violated the due process clause and the equal protection clause of the Fourteenth Amendment of

*Rights under the Federal Constitution were again urged by plaintiff-in-error in her unsuccessful application to the California Supreme Court to review the decision of the District Court of Appeal. Her petition to the California Supreme Court was in this regard identical—with the slightest verbal changes—with the closing brief in the District Court of Appeal attached hereto as Exhibit B.

the United States Constitution, having thus been raised by the briefs in the California District Court of Appeal, the order of that Court—which amended the record and was itself part of the record—shows conclusively that these Federal questions were not raised too late under the state practice and were passed upon by the state court (*Cincinnati Packet Co.* vs. *Bay*, 200 U. S., 179, page 182; compare *Miedreich* vs. *Lauenstein*, 232 U. S., 236). This order of the California District Court of Appeal—which, by reason of the refusal (Record, page 1) of the State Supreme Court to review the District Court's decision, became the court of last resort—was an order of the Court (see for the form, the judgment [Record, page 1] and the order allowing writ of error [page 11]; compare *Consolidated Turnpike Co.* vs. *Norfolk Railway Co.*, 228 U. S., 596, page 598).

The failure of Judge Richards in his opinion to mention any of the Federal questions thus presented to the California District Court of Appeal by plaintiff-in-error's briefs, is explained by the fact that the question of the constitutionality of the California Criminal Syndicalism Act both under the State and Federal Constitutions, had been determined adversely to plaintiff-in-error upon her previous application for a writ of prohibition which was denied by the Supreme Court of California (*Whitney* vs. *Superior Court*, 182 Cal., 114). The Supreme Court of the state there said:

> "We see no merit in the claim that the act under which petitioner is being prosecuted is invalid as being in violation of the *federal* and state constitution." (Our italics.)

In the circumstances—with no discussion of the Federal constitutional contentions in the opinion of "the highest court of the state in which a decision in the suit could be had"—the practice here adopted was the necessary and inevitable practice. The briefs in the state court cannot be made a part of the record; the arguments in the state court are as matter of usual practice not preserved in any form. Unless a certificate or order of the state court were sufficient it would, in such a situation, be absolutely impossible to establish that there had been "drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution of the United States."

That the practice here adopted *was* the correct practice and that plaintiff-in-error is entitled to a re-hearing is established by the precise authority of this Court in *Consolidated Turnpike Co.* vs. *Norfolk Railway Co.* (228 U. S., 596). A writ of error "under section 709 Revised Statutes, now section 237 of the new Judicial Code" had been dismissed (228 U. S., 326, 330), on the ground that no federal question had been sufficiently raised in the Virginia courts. In support of an application for a rehearing it was pointed out (228 U. S., at page 598), that the certificate of the presiding judge "contains a recital to the effect that 'the Court orders it to be certified and made a part of the record in this case, and the Honorable James Keith, President Judge of said Supreme Court of Appeals, does now certify,'" etc. This Court upon the petition for a rehearing decided at page 599 that

> "to prevent any possible inference that there was any intention to doubt in the slightest degree the accuracy of the statement contained in the certificate of the presiding judge of the court below, we have concluded that as it is recited in the certificate that it was made by the order of the court itself for the purpose of affording record evidence of the fact that a Federal question was considered and disposed of, that we may treat the certificate to that effect as incorporating into the record the necessary proof of the existence of some Federal question as the basis upon which our authority to review may be exerted."

A similar practice was involved and a like ruling made in the late case of *Gitlow* vs. *New York*. Application was made to Mr. Justice Brandeis for a writ of error. He questioned whether the remittitur of the New York Court of Appeals showed with sufficient certainty that Federal questions under the Fourteenth Amendment had been before the New York court. A motion was therefore made in the Court of Appeals to amend the remittitur by court order showing this fact. The remittitur was amended by a recital in the precise form of the recital in this case that the question of the constitutionality of the statute and of its application "was considered and passed upon." Application for a writ of error was made to the full bench of this court and was granted (260 U. S., 703), and this court proceeded to review the case upon its merits (45 Sup. Ct., 625).

Wherefore, plaintiff-in-error prays that an order may be made for a re-hearing of this cause.

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,

By
JOHN FRANCIS NEYLAN,
THOMAS LLOYD LENNON,
of San Francisco,

WALTER NELLES,
WALTER H. POLLAK,
of New York City,
Attorneys for Plaintiff-in-Error.

Certificate of Counsel.

We hereby certify that we are the counsel for the plaintiff-in-error here, that the foregoing petition for a re-hearing is not interposed for delay and that in our judgment the said petition is well founded.

JOHN FRANCIS NEYLAN,
THOMAS LLOYD LENNON,
of San Francisco,

WALTER NELLES,
WALTER H. POLLAK,
of New York City,
Attorneys for Plaintiff-in-Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925—No. ~~10~~ 3

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA.

APPENDIX TO PETITION FOR REHEARING,

Showing the Correctness of the Statement which the Order of the California District Court of Appeal Made Part of the Record, that Federal Rights Under the Fourteenth Amendment were Claimed in that Court.

GALLO & ACKERMAN, INC., 107 Liberty St. and 6 Church St., N. Y.

APPENDIX.

Exhibit A.

Criminal
No. 907

IN THE

DISTRICT COURT OF APPEAL,

STATE OF CALIFORNIA.

FIRST APPELLATE DISTRICT—DIVISION ONE.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.

CHARLOTTE A. WHITNEY,
Defendant and Appellant.

APPELLANT'S OPENING BRIEF.

The defendant and appellant in this cause is a refined, cultured, intellectual woman who has spent her life and private fortune in charitable and philanthropic work for the relief and betterment of her fellowmen. This [page 2] characterization is not based upon any matters or things *dehors* the record in this case; it finds abundant support in the transcript, a transcript which does not contain a shred or syllable of evidence showing, or tending to show, that the appellant ever

by thought, word or deed, broke or advocated the breach, of any law of the land. She was convicted in the court below and sentenced to a term of from one to fourteen years in the state penitentiary on an information that charges no crime, on evidence that proves the commission of no crime. She was convicted, not because of anything that she herself ever did, not even because of anything that she herself ever *said;*—but because of the crimes and misdeeds of others,—crimes with which she was not shown to have had the remotest connection, and which it was not contended that she ever advised, counselled or ratified. She was convicted merely because of her membership in a political party which held, or rather was deemed by the police force of the City of Oakland to have held, radical views on social and economic questions.

We believe that the decision of this honorable court in this cause will have vast and far-reaching consequences. *A reversal of this conviction will have incalculable value in maintaining and safe-*[page 3] *guarding the constitutional rights of free thought, free speech and free assemblage;* it will serve as a well-merited rebuke to those who in the name of law and order, are guilty of the most flagrant and reprehensible violations of the law. We present this appeal with the utmost confidence in the justice of our cause and in the learning, wisdom and absolute fairness of the judges of this honorable court.

* * * * * * *

(Omitted as immaterial.)

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[Page 7] **I. The Information Does Not State a Public Offense, and the Demurrer Should Have Been Sustained.**

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(Omitted as immaterial.)

* * * * * * *

[Page 11] The defendant demurred to each of the several counts of the information for failure to state a public offense, for failure to state any particulars of the offense charged, or to state the acts constituting the offense in ordinary and concise language so as to enable a person of common understanding to know what was intended, and for lack of directness and certainty. This demurrer was overruled by the trial judge. We believe that it should have been sustained as to each of the counts, and cases by the hundred might be cited in support of such contention, but in view of the fact that no verdict was reached on the last four counts, and that the same were ultimately dismissed, we shall confine this portion of the brief to a discussion of the first count—the one on which appellant was convicted. If that count charges no crime, such failure is not cured by the verdict, and the judgment must of necessity be reversed.

Let us say at the outset, that we are not unmindful of the fact that the appellate [page 12] courts of this state since the adoption of Section 4½ of Article 6 of the Constitution, have, with some degree of frequency, refused to reverse convictions because of technical errors and defects

in indictments and informations. But *it has never been contended that that section was designed to do away in toto with the well-established rules of criminal pleading or to abrogate the time-honored and constitutional right of every accused person "to be informed of the nature of the accusation against him." Only by some such construction can the first count of this information be upheld, for it violates every known rule and principle of criminal pleading;* it is insufficient, not only under the plain provisions of the Penal Code, but under the rules laid down by every text writer on criminal law from Hale to Wharton, and by the decisions of every court the basis of whose jurisprudence is the common law of England. As a pleading, it stands beside the fictitious information framed by the brilliant and witty Justice Henshaw to illustrate his argument in *People* vs. *Greisheimer*, 176 Cal., 44—an information charging that A "killed a man." And truth again is stranger than fiction, for the information in the case at bar is even less direct and certain as to the offense attempted to be charged than is Judge [page 13] Henshaw's imaginary pleading. Among the many defects, uncertainties, and insufficiencies in the first count, we may note the following:

In the first place, it is merely alleged that the defendant organized, assisted in organizing, and became a member of *an organization*. The organization is not named, neither is it described in any manner whatever. If the organization referred to had a name or a common designation, it should have been set forth. If it had no name or definite designation, that fact should have been stated, and some descriptive phrases should have

been used. In the trial of the cause the District Attorney offered proof tending to show that the defendant actually joined an organization or political party known as the Communist Labor Party. Certainly it would have been easy for the District Attorney to have pleaded the name of such organization in the information. For all that appears from the information, the unlawful organization or society which the defendant is accused of organizing might be the Democratic Party, the Methodist Church, the Knights of Columbus, or the Ladies' Aid Society. Furthermore, while it is alleged that she became a member of an organization, etc., of persons organizing and assembling, to advocate, teach, aid and abet criminal syndicalism, it is not alleged in the first [page 14] count and cannot be ascertained therefrom how or in what manner or by what means the said organization would or could or did *advocate* or *teach* or *aid* or *abet* criminal syndicalism, neither is it alleged what the criminal syndicalism consisted of, and none of the facts or circumstances constituting the same are set forth. Plainly, these allegations in the information are merely conclusions of the pleader, and are not in any sense of the word a *statement of the acts* constituting the offense attempted to be charged. The information is fully as insufficient as would be an information which merely charged that the defendant on a certain day "committed the crime of burglary," without naming or describing the premises or stating the intent with which the entry was made.

It is a fundamental rule of criminal pleading that where the statute itself so describes the par-

ticulars constituting the crime that the statutory language is sufficient to apprise the defendant of the nature of the act with which he stands charged, an indictment or information drawn in the language of the statute is sufficient, but the rule is otherwise where the statute uses general language, or employs generic terms which are not in themselves a statement of the acts constituting the offense. In the latter case the particulars of the al- [page 15] leged crime must be set forth. It is an elementary rule that an indictment or information should contain such a specification of acts and descriptive circumstances as will on its face, fix and determine the identity of the offense with such particularity as to enable the accused to know exactly what he has to meet and avail himself of a conviction or acquittal as a bar to further prosecution arising out of the same facts.

Wingard vs. *State*, 13 Geo., 396;
Harne vs. *State*, 39 Md., 552;
Commonwealth vs. *Terry*, 114 Mass., 263;
State vs. *McGinnis*, 126 Mo., 564;
Moline vs. *State*, 67 Nebr., 164; 93 Northwestern, 228;
State vs. *Pirlot*, 19 R. I., 695; 36 Atlan., 715;
Bishop vs. *Commonwealth*, 13 Gratt., 785;
U. S. vs. *Cruikshank*, 92 U. S., 542;
State vs. *Shirer*, 20 S. C., 392;
Peters vs. *U. S.*, 94 Feo., 127.

In the case at bar, the statute makes use of generic terms and words having a general meaning. Criminal syndicalism, as defined in Section 1 of the act, means a number of things. It may mean the teaching or advocating or aiding or abetting crime. It may mean sabotage or malicious physical damage to personal property. It [page 16] may mean unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change. These terms employed by the statute are general in their scope and have varying significance. To charge an offense under this act in the mere language of the statute without setting forth any particulars whatsoever does not apprise the accused of the nature of the accusation against him. Furthermore, the information in question does not even follow the language of the statute, insufficient and faulty as such a course would be. It merely uses the words "criminal syndicalism" without even the statutory description and definition of the same.

It does not set forth how or in what manner the unnamed organization referred to, proposed to or did teach or aid or abet criminal syndicalism, nor does it appear what form of criminal syndicalism the unnamed organization was formed to promote. Clearly, the information does not, to use the language of Section 950 of the Penal Code,

> "contain a statement of the *acts* constituting the offense in ordinary and concise language and in such manner as to enable a per-

son of common understanding to know what is intended."

[Page 17] At the risk of being tedious and of seeming to argue the truth of a self-evident and axiomatic proposition, we beg leave to call the attention of the court to a few authorities in support of the foregoing specifications. In *People* vs. *Mahony,* 145 Cal., 104, the court had under consideration an indictment based upon the provisions of Section 72 of the Penal Code for the presentation of a false and fraudulent claim against the county. In that case, Chief Justice Angellotti concisely states the rule of pleading applicable to the case at bar in the following language:

"It is urged in support of the indictment that it is generally sufficient to describe the offense substantially in the language of the statute. This is undoubtedly the general rule, but, as has been said, such rule simply means, 'that when the statute defines or describes the acts which shall constitute a particular offense, it is sufficient in an indictment to describe those acts in the language employed in the statute, applying them, of course, concretely to the person charged.' (People vs. Ward, 110 Cal., 369, 372.) In such cases, the statutory description gives to the accused sufficient notice of the charge against him. In the vast majority of cases the statute declaring the public offense does so define or describe the acts constituting it, but in many cases it does not, and to these

cases is applicable the qualification to the general rule described by Mr. Justice Harlan in United States vs. Simmons, 96 U. S., 360, [page 18] as a qualification 'fundamental in the law of criminal procedure, that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense, and plead judgment as a bar to any subsequent prosecution for the same offense.' Our Penal Code provides that the indictment or information must contain 'a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended' (Sec. 905, Subd. 2); that it must be direct and certain as regards 'the particular circumstances of the offense charged, when they are necessary to constitute a complete offense' (Sec. 952, Subd. 3); and that it is sufficient if, among other things, the act charged as the offense is set forth 'in such a manner as to enable a person of common understanding to know what is intended.' These provisions but recognize the principle universally recognized in civilized countries, that one accused of crime shall be allowed to know the charge against him, so that he may have an opportunity to present his defense thereto, if any he has. (See People vs. Palmer, 53 Cal., 615; People vs. Ward, 110 Cal., 369.)"

This decision is cited and approved in *People* vs. *Butler,* 35 Cal. App., 357, in which the suffi-

ciency of another indictment which attempted to charge a violation of Section 72 of the Penal Code is under consideration. If the court will examine those portions of the indictment in the Butler [page 19] case which are quoted in the opinion, it will be seen that the Butler indictment in comparison with the one in the case at bar is almost a model pleading. Notwithstanding this, it was held to be insufficient upon the ground that the offense created by that section could not be charged in the language of the statute, but that the circumstances of the offense must be set out. Another recent case strongly in point is *U. S.* vs. *Bopp*, 230 Fed., 723. In that case the defendants had been indicted for conspiring to begin and set on foot certain military enterprises to be carried on within the territory and jurisdiction of the United States against the territory and Dominion of the King of Great Britain, a foreign prince with whom the United States was at peace. The indictment alleged that the end, aim and purpose of said military enterprise was, among other things, to blow up certain railway tunnels in the Dominion of Canada, and to destroy and sink by force of arms, all ships with their cargoes and crews engaged in transporting munitions of war for Great Britain and her allies. The indictment was held to be insufficient. In the course of the opinion Judge Dooling says:

> "Neither this statute nor any other declares what is meant therein by the words [page 20] 'military enterprise,' nor what would be required to constitute such an enterprise, so that in giving effect to the statute

the court must determine from other sources what Congress meant when it used these words. So far as the conspiracy itself which is charged in this indictment is concerned, it is stated in the language of the statute without amplification; that is to say, there is no statement that defendants conspired to do certain things, which, if accomplished, would in the judgment of the pleader constitute the beginning or setting on foot or the preparing or providing means for a military enterprise, and upon the sufficiency of which things to constitute such offense the judgment of the court might be exercised.

"It is a settled rule of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same terms as in the definition; but it must state the species, it must descend to particulars, or as stated in United States vs. Carll, 105 U. S., 611, 26 L. Ed., 1135:

" 'In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity set forth all the elements necessary to constitute the offense intended to be punished.'

"The sole charge against the defendants here is that they conspired 'to begin and set on foot, and prepare and provide the means [page 21] for certain military enterprises.' This is the bald language of the statute; the

mere conclusion of the pleader. But the particular things which they conspired to do are not stated—the things which, if in fact accomplished, would constitute the setting on foot or providing means for a military enterprise. What does the pleader understand the words 'military enterprise' to mean? What in his judgment constitutes a military enterprise? The indictment gives neither the defendants nor the court any information in this regard, and the things that the pleader might regard as sufficient to warrant him in asserting that defendants conspired to set on foot or provide means for a military enterprise might in the judgment of the court fall far short of being the things intended by the statute. The language of the Supreme Court in United States vs. Hess, 124 U. S., 486, 8 Sup. Ct., 573, 31 L. Ed., 516, seems to me peculiarly applicable to the present case:

" 'The statute upon which the indictment is founded only described the general nature of the offense prohibited; and the indictment, in repeating its language, without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury.'

"The defendants are entitled to know the particular things which they are charged with having conspired to do, and the court, when the indictment is challenged, must also have this information, in order to be able definitely to say whether a conspiracy to do such particular things is a conspiracy to set [page 22] on foot or provide means for a

military enterprise. The indictment here is not aided by the averments therein that the intention of defendants and the purpose of the enterprise was to destroy tunnels, railroads, bridges, trains and ships which were engaged in the transportation of munitions of war. Such destruction is not necessarily aimed at the territory or dominions of the king of Great Britian, but might be directed only against the various companies owning such tunnels, railroads, bridges, trains and ships. And while such destruction might well be the aim of a military enterprise, it is not necessarily so, nor can it be said that everyone who might undertake so to destroy or cripple railroads or ships was engaged in such an enterprise, even though munitions of war were transported, by them. It is not even averred that the purpose of destroying the railroads and ships was to prevent the transportation of munitions of war, and the words 'railroads or ships which were engaged in transporting munitions of war,' without further averment, might well be mere words of description, having no relation to the motives of the defendant, and certainly not being sufficient to stamp every attempt to destroy such roads or ships as a military enterprise."

Perhaps the best statement of the rule applicable to charging statutory offenses in the language of the statute is found in *People* vs. *Perales*, 141 Cal., 581:

[Page 23] "While it is the general rule that it is sufficient to charge an offense in the language of the statute, yet this rule is subject to the qualification, that where a more particular statement of facts is necessary in order to charge the offense definitely and certainly, it must be made. The statute may, and often does, define the offense by the use of precise and technical words which have a well-recognized meaning, or designates and specifies particular acts or means whereby an offense may be committed.

"Under such circumstances, to charge the offense substantially in the language of the statute will be sufficient.

"When, however, the words or terms used in the statute have no technical or precise meaning, which of themselves imply the offense, or where the particular facts or acts which shall constitute it are not specified, but, from the general language used, many things may be done which may constitute an offense, it is then necessary, in charging an offense claimed to be embraced within the general language of the statute, to set forth the particular things or acts charged to have been done, with reasonable certainty and distinctness, so that the court may determine whether an offense within the statute is charged, or one over which it has jurisdiction, and so that the defendant may be advised of the particular nature of it, in order to defend against it, and to plead in bar a judgment of conviction or acquittal thereof, if subsequently prosecuted."

[Page 24] The language of the late Justice Lorigan, in the case last above quoted is cited with approval in *People* vs. *Silva*, 8 Cal. App., 349 (see also *People* vs. *Martin*, 52 Cal., 201).

Another case strongly in point, is *People* vs. *Pierro*, 17 Cal. App., 741. The defendant in that case was prosecuted under the provisions of the juvenile court law for having committed acts of a lewd and lascivious character, with an alleged dependent child. Otherwise expressed, the offense of contributing to the dependency of a minor under the age of 18 years, was the crime intended to be charged by the information. It is held in the opinion of the District Court of Appeal that the general allegation in the information that the child therein named was then and there a dependent child, was insufficient to inform the defendant of the particulars of the charge which he was called upon to meet. We quote from the language used by the court:

> "The defendant, by demurrer, objected to the insufficiency of this information on the ground that the particular acts or conduct chargeable against Valita Rhinehart by reason of which the child became a delinquent were not set out in the information, and that therefore defendant was not informed of the particulars of the charge he was called upon to meet. In our opinion, there was merit [page 25] in this objection and the demurrer to the information should have been sustained. The child, if dependent, may have become a vagrant, or a beggar, she may have become incorrigible or destitute; she may

have frequented the company of criminals, or become an inmate of a house of prostitution; or deported herself in many other ways by reason of which the character of a dependent child may have become affixed to her within the meaning of the juvenile court law. Defendant was entitled to have the information show the particulars in this regard, for he was called upon to meet the issue, first, as to whether the child had in fact become a delinquent. If she had not, the charge of contributing to the cause of such delinquency of the child or its continuance, could not be made out against him. Merely charging that the child was a delinquent within the meaning of the juvenile court law, as the district attorney did charge, when the statute enumerates many and different acts by reason of which a child may become a delinquent, cannot be said to satisfy the requirement of section 952, Penal Code, which provides that an indictment or information must be direct and certain, as it regards '3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense.' "

We further respectfully call the attention of the court to the following authorities:

I. Wharton's Crim. Proc. (Kerr's Ed.) Secs. 269, 270;
[Page 26] *Sykes* vs. *State*, 66 Ala., 70;
Grattan vs. *State*, 71 Ala., 344;
Bates vs. *State*, 31 Ind., 72;

State vs. *Windell*, 60 Ind., 300;
State vs. *Flint*, 33 La. Ann., 1288;
State vs. *Simmons*, 73 N. C., 269;
State vs. *Meschac*, 30 Tex., 518;
State vs. *Higgins*, 53 Vt., 191;
Commonwealth vs. *Chase*, 125 Mass., 202;
U. S. vs. *Ballard*, 118 Fed., 757;
Haynes vs. *U. S.*, 101 Fed., 718;
State vs. *Halsted*, 39 N. J. L., 402;
State vs. *Kentner*, 178 Mo., 487;
Collier vs. *Commonwealth*, 110 Ky., 516; 62 S. W., 4.

In concluding this portion of our argument, we most respectfully urge to the court that the overruling of the demurrer in this case by the trial court was not a mere technical error. It deprived the defendant of a substantial right,—the right to be sufficiently informed of the nature of the accusation against her, to enable her to prepare her defense. The defendant and her counsel went into the trial of this case without the slightest knowledge as to what alleged acts of the defendant the District Attorney would rely upon for her conviction. Not only were these uncertainties and insufficiencies of the information raised [page 27] *by demurrer, but defendant's counsel in an effort to ascertain what his client was charged with and what he must be prepared to meet and disprove, moved the court for an order to compel the District Attorney to furnish him with a bill of particulars—a procedure sanctioned by the practice of the federal courts. This motion as appears from the clerk's transcript, was denied by the trial judge.*

Both before and during the trial, defendant's counsel sought, without success, for information as to what their client was actually charged with. Under the information as drawn, the District Attorney might have proved that the defendant had organized or become a member of any society or assemblage that the mind could conceive, and then proceeded to introduce evidence as to the character, belief and doctrines of such organization. If the information in this case is held to be sufficient, we say, with the utmost sincerity, that criminal pleading might as well be abolished.

Tested by every known rule covering the sufficiency of indictments and informations as laid down by the learned text writers and by the decisions of the highest courts of this and every other state, and by the federal courts as well, the information in the case at bar is clearly insuffici- [page 28] ent to sustain a conviction. It would have been insufficient even in the absence of a demurrer. The reports are full of cases where indictments and informations which describe the offense attempted to be charged with a far greater degree of certainty, have been held bad. We know of no rule of law and are aware of no decision upholding such a pleading as the information in question. For this reason alone, the judgment should be reversed.

II. The Evidence was Insufficient to Justify the Verdict.

* * * * * * *

(Omitted as immaterial.)

* * * * * * *

[Page 39] *However radical or contrary to prevailing opinion the views of an individual or society may be, mere opinion cannot be punished as a crime.* Conspiracy to violate the law may be criminal, but to seek to change the law by peace-[page 40] able means,—by the ballot or by political action,—cannot be punishable. And yet this, according to the admission of the District Attorney himself, is what the defendant was in favor of doing, and we challenge the Attorney General to point out to the court any evidence in the record which by any reasonable inference tends to show that the organization which she joined advocated the commission of any crime or the violation of any law.

The right of every citizen under the Constitution and fundamental laws of this land to freedom of conscience and freedom of speech, and to advocate changes both political and economic, is well expressed in the language used by Justice Kerrigan of this court, while sitting on the supreme bench, in the case of In re Hartman (*Crim.* 2300, *decided March* 13, 1920):

> "Nothing would seem to be more certain than that the inhabitants of the United States have both individually and collectively the right to advocate peaceable changes in our Constitution, laws or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis."

The charge in the count in the indictment on which the defendant was convicted is that she did unlawfully, wilfully, wrongfully, deliberately and [page 41] feloniously organize, and assist in organizing, and was, is and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism. The proofs do not show that she ever organized or became a member of any such organization. There is nothing either in the platform of the Communist Labor Party adopted at the Oakland meeting hereinabove referred to, or in the platform or program of the Communist Labor Party of the United States (People's Exhibit 5—Rep. Trans., pages 411-439) which either expressly or by implication advocates the violation of any law or the use of force or violence in bringing about political or industrial changes. There is no evidence of any combination or conspiracy, by the Communist Labor Party or among any of the members thereof, to commit any crime, to inaugurate terrorism, or to use unlawful measures in bringing about their desired ends. For this total failure of proof the judgment of conviction should be reversed.

III. Prejudicial Error in the Admission of Evidence.

* * * * * * *

(Omitted as immaterial.)

* * * * * * *

[Page 61] **The Conviction a Miscarriage of Justice.**

We have presented briefly, but we believe with sufficient detail, the issues involved upon this appeal. The defendant was tried and convicted, not for any act of her own, but because other persons, with whom she was not shown to have had the [page 62] slightest dealings, started fires and carried poison in other parts of the State, because irresponsible fanatics sang doggerel verses set to Methodist tunes, and because a French Nihilist wrote a book dealing with matters and things so preposterous that its author should have been brought before a lunacy commission. We do not wish to be guilty of levity, in arguing a cause which involves the liberty of an innocent woman, but where it appears from the record as it does in this case that the police of one of the larger cities of this State raided the house of a law-abiding citizen, suspected of holding radical views, and, among other things, confiscated a copy of the English Bible,—then it seems to us that language fails to properly characterize the absurdity of this prosecution from its very inception. Where a District Attorney is allowed to convict a defendant residing in this State of the offense denounced by this statute by reading from the writings of foreign fanatics, we say in all seriousness, that he might as well have been permitted to have read to the jury from the Book of Judges or the Book of Kings, and to have taxed the defendant with responsibility for the assasination of Uriah or the judicial murder of Naboth. The evidence in this case, insofar as it relates to the defendant herself, fails utterly to prove that

she ever in word, thought or deed violated or [page 63] intended to violate any law upon the statute books or do the slightest injury to the persons or property of others. The information upon which she was convicted does not charge any crime known to the law. When this court has examined, as it must examine, the entire case including the evidence, we believe that it will say that in this judgment of conviction there has been a miscarriage of justice.

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco, July 21, 1920.

J. E. PEMBERTON,
NATHAN C. COGHLAN,
Attorneys for Appellant.

WILLIAM F. HERRON,
of Counsel.

Exhibit B.

IN THE

DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT, Division One.

Criminal No. 907.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

CHARLOTTE A. WHITNEY,
Defendant and Appellant.

APPELLANT'S CLOSING BRIEF.

Preliminary Statement.

* * * * * * *

(Omitted as immaterial.)

* * * * * * *

[Page 2] An analysis of the 998 pages of testimony taken at her trial does not disclose one word even purporting to show—

That she ever committed an act of violence;
That she ever aided or abetted violence;
That she ever advised violence;
That she ever uttered a violent sentiment;
That she ever knew of any act of violence offered by any organization or individual belonging to any organization;
Or even that the organization in which she admits membership ever committed any act of violence.

On the contrary, the record indicates that Charlotte Anita Whitney was opposed to all violence and held convictions against it as strongly as those held by people of the Quaker faith, whose religious scruples are respected and not made the basis for sneers and prosecution.

It is not alleged nor suggested that Charlotte Anita Whitney was ever a member of the Industrial Workers of the World or of the Bolshevists of Russia. There is not one scrap of evidence even remotely suggesting that she ever endorsed any act of violence either by these organizations or by individuals belonging to these organizations. Yet appellant believes that no intelligent human being can review the record of her trial and not be forced to believe that a conviction was secured [page 3] by inflaming the minds of the jurors with the idea that she was in some degree responsible for and sympathetic with the atrocious crimes committed either by these organizations or members thereof.

It is respectfully urged that never in the history of California was there a plainer miscarriage of justice.

Never in the history of California was a defendant before a court of justice so ruthlessly deprived of vital rights guaranteed under the Constitution.

Never was there a more apparent indecent haste to appease public wrath by the offering up of a vicarious sacrifice.

The time has now arrived in the free United States of America when, even if inadvertently, you should join a political party which expresses sympathy with a political change any place on earth, you are a criminal syndicalist and liable to serve a sentence of fourteen years in the penitentiary. It seems incredible that this should be true, but the facts in the Whitney case prove conclusively that this is the exact fact.

An analysis of the prosecution's case and of respondent's brief demonstrates conclusively that when it was found impossible to prove that in any degree Charlotte Anita Whitney had ever advocated violence or taught violence, when it was found that her entire life was a denial of violence and that her personality was the antithesis of violence, when it was found impossible to prove that the Communist Labor Party, of which she was a member, had been involved in any violence, resort was had to the introduction of testimony as to acts committed by criminals belonging to the Industrial Workers of the World and acts committed by the Bolshevist regime in Russia.

Not only was Charlotte Anita Whitney not a member of the I. W. W. organization or of the Bolshevist party of Russia, but there is not one [page 4] shred of testimony even remotely suggesting that she ever sympathized in any degree with any of the excesses committed by any indi-

viduals belonging to any of these organizations or by these organizations as such.

In attempting to justify the deluging of the jury in the trial of Charlotte Anita Whitney with testimony as to crimes committed and advocated by the Bolshevists of Russia, thousands of miles distant, and of crimes committed by members of the I. W. W. organization two and three years prior to the trial of Charlotte Anita Whitney, counsel for respondent argues that the court instructed the jury that defendant was not to be charged with responsibility for acts done outside of her presence.

The transcript of testimony shows that conservatively speaking, sixty per cent. of the testimony taken had reference to the Bolshevists of Russia or the acts of I. W. Ws.

To assert that this testimony did not arouse in the jury an unjust prejudice against the defendant after the jury had witnessed the admission of this testimony as pertinent, competent and relevant, and after the jury had listened to this testimony hour after hour and day after day, is to deny the obvious.

If it were simply desired to show the character of the Bolshevist regime in Russia and of the I. W. W. organization, and if it were not the determination of the prosecution to inflame the mind of the jury unjustly against Charlotte Anita Whitney, what further testimony was necessary, admitting for the sake of argument that it was relevant and competent, than the manifestoes of the Bolshevist party and the printed propaganda of the I. W. Ws.

The record shows conclusively that the prosecution was in possession of thousands of circulars by the introduction of any one of which it [page 5] could have proved the character of Bolshevism or I. W. W.ism. Yet for days we find witnesses paraded before the jury, testifying to crimes committed in remote places without the knowledge of Charlotte Anita Whitney, and without any suggestion that she had any knowledge of the crimes or what the party of which she was a member had any knowledge of the crimes testified to.

It is apparent from respondent's brief that the weakness of the proof against this defendant was such as to require conclusions not warranted by the premises on which they are based.

On page 3 of respondent's brief we find the following:

> "But on the contrary, counsel for appellant concede her intellectual powers and admit that she is learned in political and economic questions. In view of this the defendant *must* have been very familiar with the history, principles, tactics and acts of other revolutionary organizations and movements which were endorsed by the very organization, the California Communist Labor Party, of which she became a member."

A calm and judicial review of this startling sentence should serve to enlighten the court regarding the manner in which conclusions were jumped at in the prosecution of this defendant.

From the fact that Charlotte Anita Whitney was learned in political and economic questions,

the conclusion is drawn that she must have been very familiar with the history, principles, tactics, etc., of revolutionary organizations and movements.

We are enlightened regarding the necessity for this violent logic when we recall the fact that in 998 pages of testimony there is not one single word to prove or to suggest that Charlotte Anita Whitney either directly or indirectly ever had any knowledge of any revolutionary movement, and particularly is the record bare of an iota of evidence to prove that Charlotte Anita Whitney [page 6] had any knowledge whatever of any crime committed either by the Bolshevist Party of Russia or the I. W. Ws.

The necessity for the violent logic in respondent's brief, however, is further made plain when we realize that the burden was upon the prosecution to establish that Charlotte Anita Whitney *knowingly* was a party to the organization of a group committed to criminal syndicalism.

It seems apparent that having been unable to produce at the extraordinary trial accorded to Charlotte Anita Whitney any evidence to show any knowledge on her part of any revolutionary movement, the fatal missing link in the state's proof is supplied by the extraordinary logic of counsel on page 3, of respondent's brief.

Fair and Impartial Trial.

* * * * * * *

(Omitted as immaterial.)

* * * * * * *

[Page 16] It also tends to an understanding of respondent's brief to bear in mind the following, from page 7:

> "In other words, all the good of the French revolution proceeded not from violence and mob action, but through the orderly processes of law and legislation."

By inference we may deduce that the violence of the American revolutionary army in attacking the British was a most reprehensible mistake, and that the thirteen colonies should have proceeded through the orderly processes of law and legislation to redress their wrongs.

Sepiently, counsel for the respondent proceeds:

> "The foregoing suggests the reason for the enactment of the criminal syndicalism act as well as its spirit and purpose."

[Page 17] We can only conclude that the American revolutionists were wrong and that the whole spirit of freedom of political thought and liberty for which that contest was waged was a mistake.

If it were not for the fact that through the autocratic abuse of administrative power in the United States during the last four years, the rights of American citizens to freedom of thought and freedom of action have been reduced to a shred of those which they formerly enjoyed, it would be hard to understand how such assertions could be seriously made in a document presented to a court of justice in the United States of America.

Under the circumstances, however, respondent's brief is enlightening in showing how far we have drifted from the fundamental concepts of the rights of American citizens.

There is no question that the criminal syndicalism law, insofar as it is aimed at the cowardly and brutal crimes committed in secret in connection with industrial warfare, has acomplished good, but insofar as it has been utilized as an engine of tyranny to deprive American citizens of freedom of political thought and speech, it is a replica of the alien and sedition laws enacted in America, in the latter part of the eighteenth century, which were so hateful in the eyes of the American people that they wrecked the political party responsible for their enactment.

In respect to the instant case, we wish earnestly to direct the attention of the court to the vital distinction between the case of Charlotte Anita Whitney and the cases of People vs. Malley, 33 Cal. App. Dec., 346, and People vs. Taylor, 34 Cal. App. Dec., 414.

[Page 18] In each of these cases it was shown that the defendant was not only a member of the Communist Labor Party but had been or still was a member of the I. W. Ws.; that in each case the defendant was active in the distribution of literature and the spreading of the propaganda of this organization.

In the case of Charlotte Anita Whitney, there is no allegation that either now or at any time in the past she was ever a member of the I. W. Ws. or of the Bolshevist Party of Russia, or that she at any time ever distributed any literature of these organizations or that at any time she ever

expressed any sympathy with acts of violence committed by these organizations.

In the case of Charlotte Anita Whitney the sum total of her offense consists in the fact that she was present at the organization meeting of and joined a political party known as the Communist Labor Party, and that she participated in some of the deliberations of some of the committees of that party during a party convention.

It is admitted that she acted as a member of the credentials committee and that she also acted as a member of a committee which adopted a resolution advocating amnesty for political and class war prisoners.

In other words, in so far as this record shows, Charlotte Anita Whitney is sentenced to serve fourteen years in San Quentin prison because in broad daylight she walked into a public convention hall in the City of Oakland, there joined a political party, acted as a member of the credentials committee, and was a member of a committee which adopted a resolution advocating amnesty for political and class war prisoners.

[Page 19] *Constitutionality of Criminal Syndicalism Act.*

Conscious of the fact that in passing on an application for a writ of prohibition the Supreme Court of the State of California has rendered an opinion stating—"*We see no merit in the claim that the act under which petitioner is being prosecuted is invalid as being in violation of the federal and state constitution*"; and also conscious of the fact that this honorable court has by im-

plication upheld the constitutionality of the act by reference to the case of People vs. Moilen, 167 N. W. (Minn.), 345, 348, appellant respectfully urges that a thorough review of all of the aspects of this question will sustain the contention of unconstitutionality as to a portion of the California Act, and will demonstrate conclusively the vital distinction between the criminal syndicalism act of the State of Minnesota and the criminal syndicalism law enacted by the State of California.

Appellant respectfully urges that the criminal syndicalism law of the State of California, as it stands, is violative of the 14th Amendment of the Constitution of the United States.

The case of the State vs. Moilen cannot be taken as conclusive in relation to the California statute because of a vital difference in the language employed in the two statutes.

The Minnesota statute prohibits the advocacy of crime, etc., "*as a means of accomplishing industrial or political ends.*"

The criminal syndicalism act of California punishes violence or unlawful methods of terrorism, etc., "*as a means of accomplishing a change in industrial ownership or control or effecting any political change.*"

In other words, the Minnesota statute provides a penalty for the commission of any act of violence or the teaching or aiding or abetting of any act [page 20] of violence designed to effect any political end. It would apply with equal vigor to the person who would employ methods of terrorism or of violence, for instance, to prevent a change in the prohibition law, and to the person who

would use such methods to bring about a change in the prohibition law.

The Minnesota statute would punish the corrupt holder of a political office who would seek by methods of terrorism and violence to prevent his being ousted lawfully from office, and at the same time would punish the aspirant for political office who would resort to means of terrorism or violence to bring about the desired political end.

In other words, the Minnesota statute does not discriminate between classes of persons, but is general in its application and is in accord with the Constitution.

The Minnesota statute with equal force applies to those engaged in industrial controversies. It would punish the person who would seek by violence and terrorism to prevent a change in industrial control, as well as the persons who by those methods sought to accomplish a change.

The criminal syndicalism law of California expressly refers only to those who seek by violence or methods of terrorism to accomplish a change in industrial ownership or control, or to effect a political change.

Under the California law the corrupt holder of political office might with impunity organize a group to maintain itself in office by violence or terrorism and escape any penalty under the criminal syndicalism law, while the person desiring to oust such corrupt regime would be guilty of criminal syndicalism and liable to punishment.

[Page 21] The proponents of prohibition might organize to control by methods of terrorism elections to the legislature and not be guilty of criminal syndicalism, while the opponents of prohibi-

tion at the same election using the same methods would be.

The opponents of city and county consolidation in the City of Oakland and County of Alameda, could without regard to the criminal syndicalism law organize by violence to defeat the measure on this subject shortly to be submitted to the voters of that locality. The proponents of city and county consolidation however would be liable to fourteen years' imprisonment for the same offense.

The present owners of industries in California might practice violence to prevent the application of new laws providing for control of industries by the Railroad Commission of the State of California and not be guilty of criminal syndicalism.

Illustrations might be multiplied indefinitely to accentunate the discriminatory character of the law.

No doctrine has been more explicitly or frequently promulgated by the courts of the United States than the doctrine which holds that classifications in legislation to avoid violating the equality clause of the Constitution must be reasonable and not arbitrary.

It seems impossible to conceive a more arbitrary classification than that which permits one person or group to prevent a change while making it criminal for the opposing person or group to accomplish the change.

12 C. J., 1133:

> "Statutes passed in the interest of the public health, safety or morals, are void as class

legislation wherever they are made to apply arbitrarily only to certain persons or classes of persons, or to make an unreasonable discrimination between persons or classes." Citing cases.

[Page 22] 12 C. J., 1141:

"But on the other hand a penal statute which makes arbitrary distinctions between different persons or classes of persons, either by making certain acts criminal offenses when committed by some persons but not when committed by others * * * has been declared unconstitutional as class legislation." Citing cases.

12 C. J., 1175:

"A statute or ordinance is void as a denial of the equal protection of the laws which makes a particular act a crime when committed by a person of one race but not when committed by a person of another race."

12 C. J., 1186:

"A legislation is void as contravening the equal protection guaranty which makes an act a crime when committed by one person but not so when committed by another in a like situation" (citing cases), "or which makes the question as to whether a certain act is criminal or not depend on an arbitrary or unreasonable distinction between persons or classes of persons committing it" (citing

cases), "within these rules statutes or ordinances have been sustained which have made it a criminal offense * * * to incite to the unlawful destruction of property." Citing cases.

12 C. J., 1187:

"A statute is void as a denial of the equal protection of the laws which prescribes different punishments or different degrees of punishment for the same acts committed under the same circumstances by persons in a like situation." Citing cases.

Re Ah Fong, Fed. Cases 102 (3 Sawy., 144):

"The equal protection of the laws under the 14th Amendment, implies not only equal accessibility to the courts for the prevention or the redress of wrongs and the enforcement of rights, but equal exemption with others of the same class of all charges and burdens of every kind."

Ho Ah Kow vs. Noonan, Fed. Cases 6546 (5 Sawy., 552):

"The equality of protection assured by the 14th Amendment implies that no charges or burdens shall be laid upon one person which are not equally borne by others, and that in the administration of federal justice one person shall suffer for his offenses no

greater or different punishment than another."

In re Tiburcio Parrot (C. C.), 1 Federal, 481, 1 Ky. L. R., 136:

"Discriminating legislation by a state against any class of persons or against persons of any particular race or nation in what-[page 23] ever form it may be expressed, deprives such class of persons, or persons of such particular race or nation, of the equal protection of the laws and is prohibited by the 14th Amendment to the Constitution of the United States."

State vs. Williams, 32 S. C., 123, 10 S. E., 876:

"General statutes 2084 which makes the violation of a contract between land owner and a laborer indictable and fixes the limit of punishment in the case of the landowner but imposes no limitation in the case of the laborer, is unconstitutional as making a discrimination in the punishment which may be imposed."

Peonage Cases, 123 Fed., 671:

"Act of Alabama, Mar. 1, 1901, makes it a penal offense for any person who has contracted in writing to labor for another for any given time * * * and who shall afterwards without the consent of the other party and without sufficient excuse, to be adjudged

by the court to 'leave such other party * * * and take employment of a similar nature from other persons without giving him notice of the prior contract.' "

"Another statute subjects the new employer to penalties if he employs such person with knowledge of the prior contract. Held, such statute is unconstitutional as class legislation, subjecting laborers to penalties for breach of contract which are not imposed on any other class of citizens. Statute also denies to class of citizens affected the equal protection of the laws."

Re Langford, 57 Fed., 570:

"The act involved required knowledge on the part of the person charged that intoxicating liquor was intended for sale; subdivision 2 made it a criminal offense for any servant of a special class of common carriers to remove from a car any intoxicating liquor whatever, without any qualification as to knowledge that it was intoxicating liquor and without attaching any liability to the person receiving the liquor from the carrier. Held, subdivision 2 discriminated in singling out one class from the whole community for punishment. The South Carolina constitution provided that 'No person shall be liable to any other punishment for any offense, or be subjected in law to any other restraints or disqualifications in regard to any person rights, than such as are laid on others under like circumstances.' "

Horwich vs. Walker Gordon Laboratory Co., 68 N. E., 938:

"Act prohibiting sale and use of cans, boxes, bottles, etc., bearing the registered mark of the owner without his consent is in contravention of the Constitution, Art. IV, [page 24] par. 22, prohibiting special legislation, as it gives the owners of the property of the class named rights not enjoyed by owners of other classes of personal property."

"The act also provided that the possession of such articles by junk dealers was prima facie evidence of unlawful possession. Held, unconstitional, as it authorized conviction of such dealers on evidence that would not warrant the conviction of other persons."

The analogy here, is that the joining of a society advocating crime to bring about a political change is a violation of the criminal syndicalism law, while the joining of a similar society for the purpose of preventing a political change is not a violation of the law.

Re Opinions of Justices, 207 Mass., 601, 94 N. E., 558, 34 L. R. A. N. S., 604.

"Rendering proprietor of a Chinese restaurant criminally liable for permitting women under the age of twenty-one years to enter it or be served with food and drink there, deprives him of his liberty and property without due process of law and deprives him of the equal protection of the laws. Po-

lice power does not extend to exclusion of young women from restaurants kept by Chinese, since such a regulation has no direct relation to the evil to be remedied."

The above is from the syllabus. The following is the last paragraph of the opinion:

"The fact that a man is white, or black, or yellow, is not a just and constitutional ground for making certain conduct a crime in him when it is treated as presumably an innocent act in a person of a different color."

American Sugar Refining Co. vs. McFarland, 229 Fed., 284:

"Act of Louisiana, par. 10, of 1915, regulating the business of refining sugar, provides that any person engaged in the business of refining sugar within the state, who shall systematically pay in Louisiana a less price for sugar than he pays in any other state, shall be prima facie presumed to be a party to a monopoly or combination in restraint of trade or commerce and upon conviction thereof subject to a fine of $500 a day for the period during which he is adjudged to have done so, and that the business of refining sugar within the meaning of that act is thereby defined to be that of any concern that buys or refines raw or other sugar exclusively, or that re- [page 25] fines raw or other sugar taken on toll, or that buys or refines more raw or other sugar than the aggregate of the sugar pro-

duced by it from the cane grown and purchased by it. Held, that the discrimination between the sugar refiners to which it applies and buyers of sugar not engaged in refining or refiners of sugar not engaged in refining in Louisiana, or not buying or refining more sugar than that produced from cane grown and purchased by them, or not buying sugar in any other state, is such a denial of the equal protection of the laws to the refiner to which it applies as to render the statute invalid and unenforceable, as it makes the fact of ones ownership of property in Louisiana the test of criminality, *and makes an arbitrary selection of the parties who shall be subjected to its penal provisions,* without regard to any difference between their delinquency and that of others."

The following is taken from the opinion:

"Unless the legislature may arbitrarily select one corporation or one class of corporations, *one individual or one class of individuals,* and visit a penalty upon them which is not imposed upon others *guilty of a like delinquency,* this statute cannot be sustained. * * * Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this." Citing Gulf of Colorado and Santa Fe R. R. vs. Ellis, 165 U. S., 150, 159, 17 Supreme Ct., 255, 258, 41 L. E., 666.

Re Mallon, 16 Ida., 737, 22 L. R. A. N. S., 1123:

"Sec. 6452 Revised Codes, in fixing the punishment of a person who escapes from a state's prison at the same term for which he is serving at the time of the escape denies equal protection of the law to persons under like circumstances, and, in providing that the escape of a state prisoner is made a crime and exempting federal prisoners and others who may be confined in the penitentiary for temporary purposes, is special and discriminatory legislation and violates the 14th Amendment to the Constitution of the United States and the Constitution of Idaho."

Miller vs. Sincere, et al, 112 N. E., 664:

"While the legislature has a wide discretion in determining what shall be considered a crime and the classification of crimes, discriminations of criminal statutes applying to certain persons or classes must be based on valid, and not upon mere arbitrary classification in favor of certain individuals or corporations."

Commonwealth vs. International Harvester Co. of America, 115 S. W., 755:

"A statute which, when construed according to the canons of statutory construction, *confers a right on one class of citizens to do* [page 26] *an act made a criminal offense*, when done by one other class, conflicts with the 14th Amendment of the Federal Constitution."

State vs. Latham, 98 Atl. (Me.), 578:

"If legislative regulations differ as to localities, classes and conditions, the classifications must be reasonable, and based upon a real and not arbitrary difference in conditions.

"Revised Statute Chapt. 136, par. 12, requiring milk dealers to pay for purchases semi-monthly, and providing for punishment by fine on default in payment, is unconstitutional as violating Constitutional Amendment No. 14, as to class legislation and is not justifiable under the police power as being for the protection of public health."

The above is from the syllabus.
The following is from the opinion:

"Diversity in legislation to meet diversities in conditions is permissible. But if legislative regulations for different localities, classes and conditions differ, in order to be valid, these differentiations or classifications must be reasonable and based upon real differences in the situation, conditions or tendencies of things. Arbitrary classification of such matters is forbidden by the Constitution. If there be no real difference between the localities or business or occupation or property, the state cannot make one in order to favor some person over others." Citing a large number of cases.

"This statute does not apply to all classes of debtors, but to one class. It does not apply to all debts incurred by purchase of products, but to one class of debts. * * * *It subjects a class of debtors to liability of crim-*

inal prosecution to which other classes of debtors are not subject."

Re Van Horn, 70 Atl., 986, from the opinion:

"'Equal protection of the laws' must certainly mean equal security or burden, under the laws, to everyone similarly situated. A statute to escape condemnation as infringing the rights guaranteed by this amendment (14, United States Constitution) must bear alike upon all individuals and classes and districts that are similarly situated, in a similar manner, and with uniformity. Otherwise, there would be unjust discrimination which this constitutional mandate prohibits. The purposes of the constitutional amendment must have been to prevent that which was arbitrary and capricious and to require uniformity and equality under like conditions. The so-called police power of the legislature which enables it to make regulations and restrictions to protect the health, morals, [page 27] safety or welfare of the general public; and its determination will rarely, if ever, be interfered with by the courts. But this does not justify a legislative enactment which discriminates when there is no basis for discrimination. *Wherever an enactment has attempted to make that a crime in one place which by all the laws of reason must be a crime elsewhere within the same jurisdiction*, such attempted distinction is found by the courts to be illusory and the act is held unconstitutional."

State vs. Divine, 98 N. E., 778.
Birmingham Water Works Co. vs. State, 48 So., 658:

"*The sum of these provisions is that no burden can be imposed on one class of persons, natural or artificial, which is not in like conditions imposed on all other classes.*" Citing cases.

Sterret Packing Co. vs. Portland, 74 Ore., 260, 154 Pac., 419:

"An ordinance providing for the inspection of meats and slaughter houses located without the city as a condition precedent to the sale of products within the city, but exempting slaughter houses and placing plants subject to federal inspection laws, is invalid in so far as it prescribes higher inspection regulations than those fixed by federal rules."

State vs. LeBaron (Wyo.), 162 Pac., 265:

"Act limiting hours of labor for females is unconstitutional so far as applying to restaurants as class legislation under the constitution of the United States, amendment No. 14, because applying to all hotels and restaurants except 'those operated by railroad companies,' the distinction being arbitrary and unreasonable."

American Digest, decennial edition, Vol. 4, Constitutional Law, page 1752.

State vs. Sauter, 82 N. W., 445, 111 Iowa, 1, 53 L. R. A., 763, 82 Am. St. Rep., 489.

"Where there are two concerns engaged in precisely the same business and both conducting it in precisely the same manner, *a statute which would undertake to impose a liability on the one and not on the other* could not be sustained in the face of either our state or federal Constitution." Sams vs. St. Louis & M. R. R. Co., 174 Mo., 53, 73 S. W., 606, 63 L. R. A., 475.

"*It is not competent for the legislature to give one class of citizens legal exemption from liability for wrongs not granted to others;* and it is not competent to authorize any person, natural or artificial, to do wrong to others without answering fully for the wrong." Park vs. Detroit Free Press Co., 40 N. W., 731, 72 Mich., 560, 1 L. R. A., 599, 16 Am. St. Rep., 544.

[Page 28] "A valid classification for legislative purposes must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any just basis. It must be grounded upon a reason of a public nature, and the act must affect all who are within the reason for its enactment." *Judgment (C. C.), 128 F., 474, reversed.* Knox vs. Erie R. Co., 133 F., 602, 67 C. C. A., 653, 68 L. R. A., 788.

Statute Vague.

Again the statute is open to constitutional objection on the ground that its terms are vague and not susceptible of definition.

Respondent argues that because the Communist Labor Party of Oakland endorsed the platform of the National Communist Labor Party, and the National Communist Labor Party endorsed Bolshevism, it was therefore permissible to introduce in evidence manifestoes of the Bolshevist Party of Russia to show the character of the Communist Labor Party of Oakland (page 49).

This being true, then it would be the duty of the District Attorney of Alameda County immediately to cause the arrest and prosecution as a criminal syndicalist of every person who joined the Friends of Irish Freedom. It would be proper to introduce in evidence the resolutions of this organization endorsing the struggle of the Irish people for liberty. It would then be proper to introduce in evidence the manifestoes of De Valera and the Irish Republican Government, forbidding Irishmen to pay taxes to England, and to combat English military forces with violence. Thus the Friends of Irish Freedom in Oakland would be proved to have endorsed violence in the accomplishing of political change and would be criminal syndicalists.

But appellant will freely predict to this honorable Court that it will never be called upon to sustain or reverse the conviction of a Friend of Irish [page 29] Freedom as a criminal syndicalist. The reasons for our confident prediction need not be

expatiated upon. Everyone knows that if this absurd provision of the criminal syndicalism law were enforced or attempted to be enforced against those sympathizing with the struggles of Ireland against butchery and tyranny, the entire law would be blotted out of the statutes at a special session of the legislature if the lawmaking body did not happen to be convened in regular session.

Conclusion.

The political features of the criminal syndicalism law of the State of California today, it is respectfully urged, *are not only unconstitutional but repugnant to every American ideal of freedom of thought and freedom of speech.*

It is respectfully submitted that the judgment of the trial Court should be reversed.

Respectfully submitted,

NATHAN C. COGHLAN,
J. E. PEMBERTON,
JOHN FRANCIS NEYLAN,
Attorneys for Defendant and Appellant.

Dated, April 8th, 1921.

Exhibit C.

IN THE

DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA,

IN AND FOR THE FIRST APPELLATE DISTRICT,

Division One.

Crim. No.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

CHARLOTTE A. WHITNEY,
Defendant and Appellant.

SUPPLEMENTAL BRIEF FOR APPELLANT.

Since the writing of the opening brief for the appellant in this cause, a decision has been handed down by this Court which in certain particulars discusses and passes upon one of the contentions which we raised in our opening brief, and renders it desirable, therefore, that we file a supplemental

brief, to present our views of the decision referred to and its applicability to the case at bar. The decision to which we have reference is

People vs. Malley, 33 Cal. App. Dec., 346, decided on Oct. 18th of this year. We assume that the Malley case will be cited by the Attorney-General as upholding the sufficiency of an indictment based upon the same statute as that in the case at bar, and accordingly we deem it of importance to discuss at some length the scope and effect of that important and far-reaching decision. We take this procedure for the additional reason that we believe, with the highest respect to this Court, that the opinion in the Malley case is justly subject to criticism upon grounds which may not be urged by counsel in that cause upon a petition for a rehearing or upon a petition for a hearing in the Supreme Court. It is our purpose in this [page 2] memorandum to show, *First*, that this Court erred in holding that the indictment in People vs. Malley was sufficient and, *Second*, that in any event the Malley case is not authority in the case at bar for the reason that the information in this cause is deficient in important particulars in which the Malley indictment was not. We also propose herein to raise a federal, constitutional question.

I.

Criticism of the opinion of this Court in People vs. Malley.

We believe, and most respectfully urge, that the question of the sufficiency of the indictment in People vs. Malley was erroneously decided by this Court. We further submit that the decision therein is not only contrary to the overwhelming weight of authority, but that it overturns the most fundamental and universally established rules of criminal pleading relating to statutory offenses. The charging portion of the indictment in the Malley case avers that the defendant did "wilfully, unlawfully and feloniously circulate and publicly display, certain books, papers, pamphlets, documents and other printed and written matter, then and there in the possession, custody and under the control of him, the said James P. Malley, containing and carrying written advocacy, teaching and advising the commission of crime, sabotage, and other wilful and malicious damage and injury to property, and unlawful acts of force and violence, and unlawful method of terrorism as a means of accomplishing a change in industrial ownership and control, and effecting political changes."

The Court, after calling attention to the fact that the indictment substantially follows the [page 3] language of the statute, goes on to say:

> "To hold that the indictment does not state a public offense, would be to say that the statute defines none, for as we shall presently

show the former follows and employs almost the precise language of certain sections of the act. The language of the statute and of the indictment being the same, the latter must be understood in the same sense as the former. (People vs. White, 34 Cal., 183, 186.)"

This seems to us an extremely novel statement of the law, to say the least, and the fallacy of the statement is easily susceptible of demonstration. There are many penal statutes which define and punish offenses and which do not contain and cannot in their very nature contain a statement of the acts constituting such offenses, for the reason that the offense may be committed by a great variety of acts. In such cases it would certainly be inaccurate to say that the statute defines no offense, and yet no lawyer would pretend for a moment that an indictment which merely followed the language of the statute would be sufficient. Let us take two or three illustrations.

There is a penal statute in this state which makes it a crime to obtain the money or property of another by false or fraudulent pretenses. Who would say that such a statute defines no offense? Yet who, on the other hand, would contend for one moment that the crime therein denounced could be charged in the language of the statute? To hold that it did would be to set at nought the decisions of every court of last resort from Maine to California.

There is a statute making it a crime to receive stolen property, knowing the same to have been stolen. Of course the statute defines an offense,

and yet who would seriously urge that a mere charge in the language of the statute which did [page 4] not set forth the fact that the property had been stolen, or by whom, or describe the property with reasonable certainty, would be sufficient?

It is a crime under the law of this state to falsely testify to any material matter in any proceeding or action in which an oath may be administered. Of course the statute defines, and defines sufficiently the crime of perjury. Yet who would contend for a moment that an indictment for perjury which merely followed the language of the statute, was sufficient?

The penal code of this state (sec. 470) also provides that "every person who with intent to defraud * * * falsely makes, forges or counterfeits any charter, letter-patent, deed, lease, indenture, writing-obligatory, etc.," naming a great number of written instruments, is guilty of forgery. Clearly the statute defines the offense, yet what lawyer of the slightest experience or knowledge of criminal pleading would seriously contend that an indictment which merely charged what "A forged, altered and counterfeited a certain deed" would be sufficient? Yet there is no reason why any of these confessedly insufficient indictments cannot be upheld, if an offense under the criminal syndicalism statute may be charged in the naked statutory language. With equal appropriateness might an appellate tribunal quote (as does this Court in the Malley case) the language of People vs. King, 27 Cal., 507: "If the defendant is guilty he stands in need of no information to be derived from the perusal of the indictment as to the means

used by him in committing the act, or the manner in which it was done, for as to both his own knowledge is quite as reliable as statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense."

[Page 5] Such reasoning, we say with all respect, is reminiscent of that used in one of Bernard Shaw's wittiest plays by a western sheriff conducting the informal trial of a suspected horse-thief, who overrules the defendant's notion for a change of venue on the grounds of local prejudice with the statement that if the defendant did not wish to be tried by a local jury he should steal his horses in another county. It is a sufficient answer to say that such is not the law as it has come down to us from time immemorial, and as it has been declared by every court of last resort in every state of our country and in every land in which the substantive and adjective law are based upon the common law of England. Furthermore the Supreme Court of this state did not in the King case use the language above quoted as a statement of a general rule of law. The language was employed with reference to the sufficiency of an indictment for murder, an indictment which was far more specific than the practice in this state requires, though not as specific as such an indictment at common law. It certainly was not employed in a general sense, for if such be the law, what need is there of any indictment at all? If the defendant is guilty, he knows what he did without being told; if innocent, he knows that he did nothing wrong, and an indictment cannot aid him in the preparation

of his defense. To judges and lawyers such arguments need no refutation. *The framers of the constitution, following the tradition as old as the Magna Charta, have provided that in all criminal prosecutions the accused is entitled to be informed of the nature and cause of the accusation against him. And the courts of this, and every English-speaking land have established from time immemorial the rule that where a statute uses generic terms and words which do not in and of themselves define the acts constituting the offense, it is not sufficient for an indictment to* [page 6] *pursue the language of the statute, but it must descend to particulars.* To this effect, in our opening brief, we cited many authorities from this and other jurisdictions. We can do no better than to quote the language of Justice Field, the great Californian, in U. S. vs. Hess, 124 U. S., 486, 31 L. Ed., 516:

> "Undoubtedly the language of the statute may be used in the general description of an offense; but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

To the same effect we see also:

U. S. vs. Crookshank, 92 U. S., 542.
U. S. vs. Summons, 96 U. S., 360.
U. S. vs. Carll, 105 U. S., 611.
U. S. vs. Bopp, 230 Fed., 723.

The California cases which pronounce this rule are cited, exhaustively we believe, in our opening brief.

We contend, therefore, that an indictment under this statute, containing as it does, generic terms and lacking specific definition of the acts constituting the various offenses denounced, cannot be couched in the bare statutory language. What is an unlawful act of force or violence such as the statute prohibits? Such an act might be one of a thousand different things. What is an "unlawful method of terrorism?" How can a Court or how can anyone say, unless informed by the indictment? The pleader's idea of an unlawful act of terrorism might not be the same as that of the Court, and if the pleader is not required to particularize, then the defendant is bound by the [page 7] pleader's conception, and not by the Court's. How can a person of common or uncommon, understanding know what is intended by an indictment which merely uses the general terms employed by this statute. The Court concedes in the Malley case that "a defendant is entitled under any statute, to a clear statement of the offense with which he is charged." How can it be said that such a statement is contained in an indictment which alleges in the bald statutory phrases that the defendant circulated books and pamphlets advocating unlawful acts of force and violence and unlawful methods of terrorism?

II.

The Malley case is not authority in the case at bar.

* * * * * * *

(Omitted as immaterial.)

* * * * * * *

[Page 9] **III.**

The Criminal Syndicalist Law violates the Constitution of the United States.

We desire at this time to raise herein a federal question. We contend that the statute under which appellant was convicted is unconstitutional; that it violates the 14th amendment to the Constitution of the United States in that it abridges privileges and immunities of citizens of the United States. We contend that it is not within the police power of the state to forbid and to punish as a crime membership in any political organization,—and it was for such membership alone that appellant was convicted. It may be conceded that overt acts or declarations designed to overturn the structure of our government by violence or by criminal or unlawful means may be punished as a crime. But mere membership in an organization, without the doing or commission of any overt act is not a crime; it is a constitutional right and privilege; and the legislature cannot otherwise provide. We further contend that the political party of which appellant became

[page 10] a member was not an organization formed for the purpose of bringing about industrial or political changes by unlawful means; that it was an organization which the appellant had a right to join, and that she committed no crime by so doing. By attempting to punish her for the exercise of her legal and constitutional right, the state is abridging the privileges and immunities of a citizen of the United States.

For these reasons, in addition to those advanced in our opening brief we ask that the judgment be reversed.

NATHAN C. COGHLAN,
Attorney for Appellant.

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To be Argued by
WALTER H. POLLAK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925—No. ~~10.~~ 3

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,
against
THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant-in-Error.

Supplementary Brief for Plaintiff-in-Error Showing that Due Process and Equal Protection Provisions of the Fourteenth Amendment to the United States Constitution were Invoked in the California District Court of Appeal and there Denied; Together with Certain Considerations Affecting the Merits.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925—No. 10.

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant-in-Error.

Supplementary Brief for Plaintiff-in-Error Showing that Due Process and Equal Protection Provisions of the Fourteenth Amendment to the United States Constitution were Invoked in the California District Court of Appeal and there Denied; Together with Certain Considerations Affecting the Merits.

This Court upon the first argument dismissed the cause "for want of jurisdiction." Plaintiff-in-Error petitioned for a rehearing, which was granted. The case was set down for a second argument upon the jurisdiction and the merits.

Jurisdiction.

The first purpose of this memorandum is to make clear that plaintiff-in-error pressed upon the California District Court of Appeal—the court of last resort to which appeal ran—contentions based upon the due process and equal protection clauses of the Fourteenth Amendment and that that court denied those contentions:

(1) The relevant documents which have been submitted to this court are the following:

The record, including an addition thereto filed December 16, 1924, and printed as pages 337-339; extracts from the briefs of Miss Whitney's counsel in the California District Court of Appeal printed as an Appendix to our Petition for Rehearing by this Court; and a copy of the petition for a hearing* by the Supreme Court of California, filed on February 11, 1926, as an addition to the record in this court, by direction of this Court.

This petition for a hearing by the California Supreme Court serves merely to show, in conjunction with the order of the California Supreme Court denying the petition (Record, page 1, fol. 1), that the highest State court refused to review the judgment of the California District Court of Appeal. It has, of course, no bearing on the showing of Federal questions raised in the State court

*By typographical error, the copy of this document filed in this court is described on its cover as a "petition for a *re*-hearing." No hearing of this cause was of course ever had in in the California Supreme Court (see order denying the petition to have the cause heard in that court, Record, page 1), and the petition itself, especially in the opening and closing paragraphs (Addition to Record, pages 1-2, 35), clearly shows its character.

of last resort, which was the District Court of Appeal (infra, pages 6-7).

(2) The addition to the record, above mentioned, recites the following order of the California District Court of Appeal:

> "It is now ordered that the said remittitur be amended by inserting therein the following statement:
>
> 'The question whether the California Criminal Syndicalism Act (Statutes, 1919, page 281) and its application in this case is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property, without due process of law, and that all persons shall be accorded the equal protection of the laws, was considered and passed upon by this Court.'
>
> And the Superior Court of the State of California in and for the County of Alameda is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly" (page 337).

The order is dated December 9, 1924, bears the signature of the Presiding Justice and is certified as correct by the clerk of the court (page 337—Compare as showing that the order is a court order, the order of affirmance by the District Court of Appeal, Record, page 1, fol. 2).

(3) It is settled that a certificate of the State court made part of the record by order of that court is sufficient to establish the raising of the Federal questions below (*Consolidated Turnpike*

Co. vs. *Norfolk, etc., Railway,* 228 U. S., 596, pages 598-599; *Merchants National Bank* vs. *Wehrmann,* 202 U. S., 295; *Cincinnati Packet Co.* vs. *Bay,* 200 U. S., 179, 182). The certificate in the case at bar is in the same form as the certificate in the recent and similar case of *Gitlow* vs. *New York.* In that case, after the addition of the certificate to the record, the application for a writ of error was referred to the full bench of this court and was granted (260 U. S., 703), and the Court proceeded to review the case upon its merits (268 U. S., 652).

(4) This Court's initial doubt with respect to the jurisdiction may have been based upon the fact that no Federal question is mentioned in the so-called "General Grounds of Appeal to the California District Court of Appeal" (Record, pages 57-9). The explanation is to be found in the principles of California criminal appellate practice. The statement of these general grounds is required only for the purpose of apprising the phonographic reporter "what portions" of his "notes it will be necessary to have transcribed to fairly present the points relied upon" (Record, page 57, see also page 59; see California Penal Code, §1247, California Statutes, 1911, page 692, amending Statutes of 1909, page 1084). Section 1247 of the California Penal Code and the related Section 1246 are attached hereto in an Appendix. An examination of these sections will show that the statement of general grounds of appeal is not directed to the formulation of legal propositions and in no way corresponds to the familiar assignment of errors in the appellate practice of many States and of the Federal courts. It is merely a require-

ment imposed upon the defeated party that "within five days" he inform the reporter which portions of the phonographic notes of *evidence* he thinks it necessary to have transcribed. The only reference to legal contentions is the declaration in the second paragraph of Section 1247 that "all argument of counsel not objected to at the time it was made" is to be "excluded" from the transcript.

The reference to "assignments of error made and passed upon in the State Court" which defendant-in-error quotes (page 4) was not made in a California case, and the phraseology there used would not be appropriate to the California practice.

(5) The failure to refer to Federal questions in the statement of grounds of appeal was therefore under the California practice as inevitable and as irrelevant as a failure to take exceptions in the trial court, as to which see Section 1259 of the California Penal Code:

> "Upon an appeal taken by the defendant in open court, the Appellate Court may, without exception having been taken in the trial Court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant." *

---

*(Cal. Penal Code, §1259 is quoted in full as Appendix C to our main brief, page 93; see also as to charges of the Court, §1176 there quoted.)

Miss Whitney's appeal was taken in open court (Record, pages 29-30).

(6) It is wholly immaterial that the Federal question may not have been raised in the trial court, or rather that it does not appear by the transcript of notes—which in general (see again §1247, Cal. Penal Code) "excludes" argument of counsel—there to have been raised. "It is," by the express language of Judicial Code, Section 237, enough that the Federal question was raised and necessarily decided by "the highest court of the State in which a decision in the suit could be had" (*Cincinnati Packet Co.* vs. *Bay*, 200 U. S., 179, page 182; *Chicago R. I., etc., R. R. Co.* vs. *Perry*, 259 U. S., 548, 551 and cases cited).

(7) The California District Court of Appeal for the First Appellate District, became in this case "the highest court" of California "in which a decision in this suit could be had" when the California Supreme Court by its order of June 24, 1922 (Record, page 1), denied defendant's petition to have her cause heard in that court. This order of the Supreme Court of California is in exactly the same form as the order of that court in the case of *Mulcrevy* vs. *San Francisco* (231 U. S., 669, see page 672), in which case Mr. Justice McKenna, writing for this court, unmistakably declared that such an order was a refusal to review and not an affirmance, and that writ of error from this court should have been directed not to the California Supreme Court but to the California District Court of Appeal. The result in the *Mulcrevy* case was a necessary deduc-

tion from the rule announced in *Norfolk Turnpike Co.* vs. *Virginia* (225 U. S., 264, page 269), that this court would construe the refusal of the highest court of a State to review a cause as a refusal to take jurisdiction and not as an affirmance,*

> "unless it plainly appears on the face of the record, *by affirmance in express terms of the judgment or decree sought to be reviewed*, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits." (225 U. S., page 269. Our italics.)

---

*The quality of the ruling by the Supreme Court of California as a refusal to allow an appeal and not as an affirmance, is conclusively shown by Article VI, Section 2 of the California Constitution which requires in the case of every actual "determination" by that court that "all decisions of the Court, in Bank or in Department, shall be given in writing, and the grounds of the decision shall be stated." There is no statement of grounds in the case at bar.

There was no appeal as of right to the California Supreme Court from the determination of the District Court of Appeal (Cal. Constitution, Art. VI, Section 4) so that the case at bar does not present the problem involved in the late decision in *Southern Electric Co.* vs. *Beha* (Advance Opinions, 1925-6, page 116—December 15, 1925). Appeals as of right in criminal causes are limited to "cases where judgment of death has been rendered." (See *Treadwell's* Annotated Constitution of California, 5th Edition, 1923, page 38.) The practice here adopted was the practice of applying for a transfer of the cause from the District Court of Appeal to the California Supreme Court after judgment of affirmance in the District Court of Appeal. Such discretionary order may be made by the Supreme Court "within 30 days after such judgment shall become final therein." That judgment does become final "upon the expiration of thirty days after the same shall have been pronounced," see *Treadwell*, ibid., page 41. For the dates in the case at bar, see judgment and remittitur of the District Court of Appeal, Record, pages 1-2, and order denying appeal by the Supreme Court, Record, page 1.

To the same effect see,

Merchants Liability Co. vs. *Smart*, 267 U. S., 126, 127;
Davis vs. *L. L. Cohen & Co.*, 268 U. S., 638, 639.

(8) In a case like the present it is only by certificate that it is possible to show that Federal questions were raised "in the highest court of the State in which a decision in the suit could be had." For the briefs in the State court are no part of the record here (*Zadig* vs. *Baldwin*. 166 U. S., 485). The oral arguments in the State court are not preserved. The opinion by the California District Court of Appeal made no reference to the Federal questions—a result, no doubt, induced by the circumstance that the Supreme Court of the State, in overruling an application by Miss Whitney for a writ of prohibition against the prosecution, had said:

> "We see no merit in the claim that the act under which petitioner is being prosecuted is invalid as being in violation of the *Federal* and State Constitutions." (*Whitney* vs. *Superior Court*, 182 Cal., 114—our italics.)

(9) The case was thus the familiar case in which a certificate of the State court, made part of the record, shows that the Federal contentions were urged below and there overruled. This Court, far from rejecting such a certificate, has been careful "to prevent any possible inference that there was any intention to doubt in the

slightest degree the accuracy of the statement contained in the certificate of the presiding judge of the court below" (*Consolidated Turnpike* vs. *Norfolk, etc., Railway*, supra, 228 U. S. at page 599).

(10) The only possible limitation upon the effect to be given to such a certificate or to any demonstration by the record itself that Federal questions were urged in the State court, is a limitation manifestly inapplicable here. We mean the limitation that if the record—or a concession of plaintiff-in-error (see *Dewey* vs. *Des Moines*, infra),—affirmatively shows that one clause of the Federal Constitution and one only was relied upon in the State courts, another clause may not be made the basis of argument here (*Keokuk Bridge Co.* vs. *Illinois*, 175 U. S., 626; *Cox* vs. *Texas*, 202 U. S., 446, 451-2), or that if only one error constituting a violation of the due process principle is shown by the record to have been urged in the State court, another error, wholly distinct and disconnected, may not be urged here (*Dewey* vs. *Des Moines*, 173 U. S., 193, 198).

In the case at bar, there is, as we shall see, no shadow of suggestion either in the record or by admission of counsel (compare *Dewey* vs. *Des Moines*, supra, page 197) that the Federal Constitutional rights to due process and equal protection raised in the District Court of Appeal and denied by that court (see order of District Court of Appeal, page 337), were limited in any way.

(11) Since the record thus shows, in the only way that it could in the circumstances show, that in the California District Court of Appeal plain-

tiff-in-error raised the Federal question of the violation of her rights under the due process and equal protection clauses of the Federal Constitution; since the record also shows conclusively that these questions were not raised too late under the State practice (*Cincinnati Packet Co.* vs. *Bay*, 200 U. S., 179, page 182), and since the record furthermore shows nothing to limit these Federal questions of due process and equal protection in their widest scope, it is accordingly open to plaintiff-in-error in this court to adduce all possible arguments in support of her claim that the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States were violated by the "California Criminal Syndicalism Act and its application in this case." "Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed" (*Dewey* vs. *Des Moines*, 173 U. S., 193, at page 198). The parties, indeed, cannot be so restricted, for the oral arguments, as we have remarked, are, in so far as we know, regularly preserved in any jurisdiction.

(12) It happens, however, that in the case at bar, it can be and has been shown that the very arguments addressed by plaintiff-in-error to the California District Court of Appeal in support of these claims of Federal right and there rejected, were to a surprising degree the same arguments we have urged in our main brief in this court. We refer to the appendix to our petition for rehearing, in which we have submitted the relevant parts

of Miss Whitney's briefs in the California District Court of Appeal.

(13) In her closing brief in the California District Court of Appeal (Appendix, Exht. B,* pages xxxii, et seq.) plaintiff-in-error, in support of her claim that the "California Criminal Syndicalism Act and its application in this case," violated the 14th Amendment of the Constitution of the United States (Appendix, page xxxii) in that it denied the equal protection of the laws (Appendix, pages xxxii-xlvi; see especially quotations from the opinions in *American Sugar Refining Company* vs. *McFarland*, 229 Fed., 284 [pages xl-xli], and *In re Van Horn*, 70 Atl., 986 [page xliv], where the equal protection clause of the 14th Amendment is specifically mentioned), strongly argued that the statute unjustly discriminated between those who opposed and those who favored change in industrial ownership (Appendix, pages xxxii, xxxiii, xxxiv).

Substantially the same argument appears in Point X of our main brief in this court.

(14) In support of her claim that the California Criminal Syndicalism Act and its application in her case deprived her of liberty without due process of law, in violation of the 14th Amendment of the Federal Constitution, plaintiff-in-error argued in the California District Court of Appeal:

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*The references in small Roman numerals are to the pages of the Appendix to the petition for re-hearing in the Supreme Court of the United States.

(a) That the statute was void for indefiniteness* (Appendix, Exh. B, pages xlvii-xlviii).

In our principal brief in this court we urged the same argument (Point V, pages 61-65) and as well a closely related argument (Point III, pages 47-51). Since the opinion of the Circuit Court of Appeal (Record, pages 2-4, especially page 4) in terms excluded from the statutory definition of the crime, the element of wrongful intent which might have supplied a definite standard of guilt (*Hygrade Provision Co.* vs. *Sherman*, 266 U. S., 497, page 501), this related ruling in the State court of last resort was made, in our main brief in this court, the subject of another separate point (Point IV, pages 52-60).

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*At page 19 of the closing brief (Appendix, page xxxi) appears the caption "Constitutionality of Criminal Syndicalism Act." On the same page (Appendix, page xxxii) under the heading we have already noted:

> "Appellant respectfully urges that the criminal syndicalism law of the State of California, as it stands, is violative of the 14th Amendment of the Constitution of the United States";

there follows a continuous discussion of equal protection (to which we have referred) which ends at the bottom of page xlvi of the Appendix. At the top of page xlvii of the Appendix appears the following caption:

> "STATUTE VAGUE. *Again the statute is open to constitutional objection on the ground that its terms are vague and not susceptible of definition.*"

A contention of vagueness definitely connected with the Fourteenth Amendment was of necessity a due process contention (Compare *U. S.* vs. *Cohen Grocery Co.*, 255 U. S., 81, 89; see also *International Harvester Co.* vs. *Kentucky*, 234 U. S., 216).

(b) That the statute as applied in her case violated the constitutional rights of free thought, free speech and free assemblage.

This claim was urged in Miss Whitney's opening brief in the California District Court of Appeal (see Appendix, page ii), and it was made unmistakably clear that the "constitutional" rights referred to were Federal rights by the reassertion in the same brief of "the right of every citizen under the Constitution and fundamental laws of *this land* to freedom of conscience and freedom of speech and to advocate changes, both political and economic" (Appendix, page xix). Again in her closing brief in the California District Court of Appeal, emphatic reference was made to the fact that the California Criminal Syndicalism Law "had been utilized as an engine of tyranny to deprive American citizens of freedom of political thought and speech" (Appendix, page xxx).*

The same arguments and arguments closely related are found in our main brief in Points VI, VII, VIII and IX (see pages 66-79).

(15) In the California District Court of Appeal Miss Whitney's counsel repeatedly and explicitly argued (as we have argued in Points I and II of our main brief) that the overruling of the "demurrer" to the information and the denial of

*These claims of Federal right are made still clearer by repeated references to "the fundamental concepts of the rights of American citizens" (Appendix, page xxx) and to "American ideals of freedom of thought and freedom of speech" (Appendix, page xlviii).

a "bill of particulars" together with the general vagueness of the prosecution as to the occasion of the offense "deprived the defendant of a substantial right" (Appendix, page xvii); "the defendant and her counsel went into the trial of this case without the slightest knowledge as to what alleged acts of the defendant the District Attorney would rely upon for her conviction" (ibid., page xvii; see also pages iii-iv, xvii-xviii, xiv, lv). Miss Whitney's counsel urged, indeed, that the denial of the "constitutional right of every accused person 'to be informed of the nature of the accusation against him'" (Appendix, page iv) involved a genuine danger of double-jeopardy (Appendix, page vi, page xiv; compare our principal brief, Point I, pages 36-7; Point II, pages 38-46). Miss Whitney's counsel made these contentions although they could not anticipate the full extent of the injury until the District Court of Appeal itself made matters worse by an opinion which, instead of clarifying the issues, confounded them still further (see our principal brief, pages 19, 21, 35). (That the plaintiff-in-error is not bound to anticipate in the State court the unconstitutional rulings which that Court is going to make, see *Saunders* vs. *Shaw*, 244 U. S., 317; and to the same effect *Merchants National Bank* vs. *Wehrmann*, 202 U. S., 295, 299.)

(16) This Court has recognized that even where the record or the concession of plaintiff-in-error's counsel shows—as here it does not show—that a single Federal question only was raised in the court below there would be "no hesitation" in

considering here a "question" which is "only an enlargement" of the question in the State court or which is "so connected with it in substance as to form but another ground or reason for alleging the invalidity" of the ruling attacked below (*Dewey* vs. *Des Moines*, supra, 173 U. S., 197-8). The lack of definiteness in the prosecution urged in Points I and II of our principal brief here was but the logical outcome of the statute's failure to define the character of the association which it made a crime. The statute carefully avoids a requirement of either knowledge or intent as an element of guilt except in becoming a member. One is guilty who "is or knowingly becomes a member." The information followed the language of the statute. It charged that "at the said County of Alameda, State of California," she "was, is and knowingly became a member." (For quotations from both the statute and the information, see our principal brief, pages 6-7). Was Miss Whitney convicted for attending the Oakland convention or for association with some other assembly or group of the Communist Labor Party; was she convicted of "knowingly" becoming a member of a group whose purposes were forbidden, or of mere presence without knowledge of or assent to such purposes? The record, like the information, leaves both occasion and intent uncertain. The opinion of the District Court of Appeal perpetuated the uncertainty by its reference (Record, pages 3-4) to three different groups—the Oakland local, the Oakland convention, and the Communist Labor Party of California—and by in so many words declaring that

Miss Whitney's "knowledge" and "realization" was "a matter with which this Court can have no concern" (Record, page 4).

(17) The California Attorney General says that plaintiff-in-error has "saved" her "objections to the validity of the *statute* itself, but *not* the unconstitutionality of its *application*" (Defendant-in-error's brief on rehearing, page 2). The distinction is meaningless. "The case must be considered as though the statute, had in specific terms provided for liability upon the precise facts" of Miss Whitney's case (*Cudahy Co.* vs. *Parramore*, 263 U. S., 418, page 422; see also *Dahnke-Walker Milling Co.* vs. *Bondurant*, 257 U. S., 282, pages 288, 289). The attempted distinction is not between the question of due process presented by the statute itself and the question of due process presented by the procedure in this case; these questions the attorney general regards as one, for he says (Defendant-in-error's brief on rehearing, page 2) that one of the federal points made in the Court below was that "the act is void for indefiniteness and that *the information in the language thereof is insufficient.*" (Our italics.)

* * * * * * *

Summarizing and restating the jurisdictional issue we find the situation to be as follows: A certificate of the State court, made part of the record, shows that the Federal Constitutional issues based upon the due process and equal protection clauses of the Fourteenth Amendment were urged in that court and there denied; we know of no case where such a showing, or any

showing, made part of the record has been refused full effect except where the record itself or the concession of plaintiff-in-error demonstrates that only one particular aspect of the Federal right was urged below and wholly disconnected contentions are pressed here; in the case at bar the record shows no such limitation, and there is no concession by counsel for plaintiff-in-error and indeed no contention to this effect, as far as we know, by counsel for defendant-in-error. On the contrary, it affirmatively appears in the case at bar that even the same "arguments," or much the same arguments, were urged below that were urged and will be again urged here. And all this appears, although the oral arguments below are not preserved; although this Court, up to the time when the District Court of Appeal acted, had not recognized that issues of free speech and the like raised a question of Federal right (see *Prudential Insurance Co.* vs. *Cheek*, 259 U. S., 530, at page 543, decided almost exactly contemporaneously with the Whitney case in the District Court of Appeal); although the Supreme Court of California in litigation involving the Whitney prosecution had in terms denied that any question of Federal Constitutional right was presented (*Whitney* vs. *Superior Court*, 182 Cal., 114); although the full infraction of constitutional right involved was not and could not be apparent until the District Court of Appeal affirmed the ruling below, and although the appeal was taken under a practice which calls in so many words for the "exclusion" from the record of the argument of counsel in the trial court.

General Considerations Concerning the Merits.

This is not a case where a defendant, whose own conviction violates no constitutional right, seeks to avoid the penalty properly attached to his act by statute on the ground that the language of the statute is broad enough to include other acts which could not constitutionally be made punishable as crimes. It is to innocent acts which clearly come within the condemnation of the California Criminal Syndicalism Act that the penalty in this case is attached. And it is upon a construction of the statute which emphatically excludes the element of conscious intent from the crime created by this statute that defendant-in-error here takes its stand (Brief for Defendant-in-Error on Rehearing, page 27).

* * * * * * *

It is impossible to affirm without holding either

(1) that intent is not an element of the crime defined by section 2, subdivision 4 of the California Criminal Syndicalism Law—and this is the view of the question which defendant-in-error especially asks this Court to take (Defendant-in-error's brief on rehearing, page 27); or

(2) that an act which is innocent when committed can become criminal by reason of subsequent conduct or subsequently formed intent—a position squarely opposed to the principle that "the criminal intent essential to the commission of a public offense must exist when the act complained of was done" (opinion of Mr. Justice Field, in *U. S.* vs. *Fox*, 95 U. S., 670, page 671); or

(3) that the mere presence within the county of one who has committed an offense of membership elsewhere is in itself a crime—a position which followed to its logical conclusion would mean that a member of any organization (whether within or without the state) which the Courts of California might hold to be within the condemnation of this act, would in California commit a fresh offense every time he went from one county to another within the state, and thus would make the mere act of crossing the county line a crime.

* * * * * * *

We again direct the attention of this Court to the difficulty of finding in the record any ground of conviction which comes within the charge set forth in the information, which can be supported by any evidence in the record, and which can be upheld on constitutional grounds.

Was Miss Whitney's presence at the opening of the convention of November 9, the crime for which she was convicted? If that convention ever took on the character of criminal syndicalism, it was not until the end of the convention, and over Miss Whitney's protest. The Attorney General admits (Defendant-in-Error's Brief on Rehearing, page 8) that all that Miss Whitney did in the convention was done before the constitution of the State organization was adopted and that her election as alternative member of the state executive committee had likewise preceded the adoption of a constitution for the state organization. Can mere presence in any assembly, however violent the opinions expressed in that assembly, be a crime?

Was her crime assisting to organize the California Communist Labor Party after the convention of November 9th? The record shows (see our main brief, pages 13, 40-41) no organization meeting in Alameda County which she attended between November 9th and November 28th, the date mentioned in the information. She cannot, therefore, be said to have violated the statute in this way.

Was her crime membership in Local Oakland, the local socialist organization to which she had belonged? This local had not, up to the time of the trial, approved the action of the Oakland Convention (see our main brief, page 41). Without such action it could not have become a part of the organization which resulted from that convention and which received its character from the proceedings at the convention.*

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*On page 6 of the defendant-in-error's brief on rehearing, the attorney general states that Local Oakland had before the convention of November 9 "endorsed the Communist Labor Party and had withdrawn from the Socialist Party." It is not noted by the attorney general that the testimony at this point (Record, page 154) made it perfectly clear that Local Oakland was not, up to the date named in the information, a part of the Communist Labor Party because that party had as yet no State organization.

The attorney general states (Brief on rehearing, page 6) that Miss Whitney "held a *membership card* at this time in said Oakland Branch of the Communist Labor Party." The evidence referred to (Record, pages 190-1) is that Miss Whitney took out a card in the "temporary organization," i. e., the organization which had for its purpose the holding of the convention at which the State party was to be formed. The prosecution relies upon the acts of the state convention in adopting the program and platform of the Communist Labor Party of America to give to the state organization the character of a criminal syndicalist organization (see defendant-in-

(*Footnote continued on next page.*)

Was her crime membership in the state organization which resulted from the convention of November 9th? This was not present in Alameda County any time between November 9th and November 28th. It had no local branch there, as we have said, and it held no meetings there at which Miss Whitney was present. Her mere presence in the County, even if she was a member of that organization, and even if that organization was of a forbidden character, cannot, in itself, have been a crime (supra, page 18).

* * * * * * *

Defendant-in-error in various parts of its brief points to different occasions and to Miss Whitney's connection with different groups as possible bases for her conviction.

The Attorney General dwells in one place upon her membership in the Oakland Local (Defendant-in-error's brief on rehearing, pages 6, 17).

In another place (Brief on rehearing, page 30) he dwells upon her part in the preliminary preparations for the Oakland Convention, as if the mere adoption of the name "Communist Labor Party" in connection with that convention and the temporary organization for it, had already brought that group within the prohibition of the California Criminal Syndicalism Act. This in spite of the fact shown by the whole history of the

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error's brief, pages 9 to 11). Holding a membership card in the preliminary organization, before any specifically unlawful purposes had been adopted by any California group could not, even in the view of the prosecution itself, have been an offense under the statute. On the same page the Attorney General admits that the purpose of the Oakland convention was "to formulate the purpose" of the California Communist Labor Party.

Oakland Convention that the principles and policies of that body remained undetermined until almost the end of the convention, and that the adoption of the program and platform of the Communist Labor Party of America was by no means a foregone conclusion but was arrived at after much dispute and controversy (Record, pages 121, 142).

In another place (Brief on rehearing, pages 15-16, 26) he points to the fact that Miss Whitney did not withdraw from the convention although she could have done so, as if her crime were precisely her failure to register, by walking out of the convention, her disapproval of the adoption of the program and platform of the Communist Labor Party of America.

And still again, the Attorney General mentions (Brief on rehearing, page 14) Miss Whitney's "membership even up to the time of the trial," as "conclusively established by these bold admissions on the witness stand." That admission did not relate to any specific organization, national, state or local, and did not relate to any time other than the time of the trial. Much less was it an admission of any act or association within the County of Alameda on or before November 28, 1919 (Compare information, Record, page 15).

* * * * * * *

At pages 9 to 11 of defendant-in-error's brief on rehearing, a very few selected passages from the platform and program of the Communist Labor Party of America, which "the California branch" "adopted by reference" are presented as giving the character of criminal syndicalism to

the state organization. At page 11 the clause of the national program and platform referring to the Industrial Workers of the World is featured, with the name of this organization in huge black letters, and with abundance of italics. It is the adoption of this clause "by reference" at the Oakland convention that the prosecution chiefly relies upon (Brief on rehearing, pages 8-11, 24-25).

* * * * * * *

Miss Whitney's connection with any active measures of criminal syndicalism, was too remote to afford any possible basis of personal guilt. It was at the Chicago convention, a national convention, that this clause recognizing "the effect upon the American Labor movement of the propaganda and example of the Industrial Workers of the World, whose long and valiant struggles and heroic sacrifices in the class-war, have earned the respect and affection of all workers everywhere" was included in the national platform. There is nothing in the record to show that acts of violence on the part of individual I. W. W.s or individual I. W. W. locals in California or elsewhere, were meant to be approved by this expression of class solidarity. There is nothing to show that any such instances of violence on the part of the I. W. W. were before the Chicago Convention of the Communist Labor Party of America or that the recognition of the I. W. W. in that party's platform was intended as an endorsement of these methods. The Oakland Convention adopted, without change, the program and platform of the Chicago Convention. No particular emphasis was laid upon the sentence in the national platform

relating to the I. W. W. There is nothing to show that the Oakland Convention intended the adoption of this platform to be a public expression of approval of any of the objectionable methods of individual I. W. W.s in California. Objectionable I. W. W. methods were not discussed at the Oakland Convention any more than they appear to have been discussed at the National Convention. Still less does the record show that Miss Whitney, who merely sat in the Convention while this resolution as an undistinguished part of the National platform was adopted, regarded this adoption as an endorsement of the violent methods which on certain occasions had been employed by individual members of the I. W. W. in the State of California. Yet it was only by treating the platform adopted by the Chicago Convention and the subsequent adoption of the same platform by the Oakland Convention, while Miss Whitney was present, as an intentional endorsement of the violent methods of individual I. W. W.s in California that a California jury could have found the organization and Miss Whitney as a member to come within the condemnation of the statute.

* * * * * * *

A so-called "resolution" presented at the Tenth National convention of the I. W. W. in 1916 (Record, page 225) is printed in defendant-in-error's brief (pages 11-13). It clearly shows on its face that it was not a resolution, but that it was part of the report submitted by "Lambert," who was, so far as the record shows, a local secretary at Sacramento (see Record, page 229). It was ap-

pended to the report of the California "Wheatland Hop Pickers Defence Committee." This is very far from showing an official endorsement of acts of violence committed by I. W. W. members in California by even the national organization of the I. W. W. itself.

* * * * * * *

Defendant-in-error contends (brief on rehearing, pages 23-24) that the evidence in the record of the "propaganda and example of the I. W. W. and its activities" was introduced for the "sole purpose" (see page 23) of showing the character and purpose of the Communist Labor Party of California, and that the jury's consideration of this evidence was limited to this purpose by an instruction of the Court. But the instruction quoted on page 25 of defendant-in-error's brief, which the Attorney General calls the "limiting" instruction, did not in fact so limit the jury's consideration of this evidence. That instruction left it altogether vague as to whether "the organization of which it is claimed the defendant was a member, or which it is claimed she organized or assisted in organizing" was in fact the I. W. W. or the Communist Labor Party.

* * * * * * *

Defendant-in-error contends (brief on rehearing, pages 19-21) that the indefiniteness of the indictment was not a lack of due process because on the preliminary examination before the issuance of the information Miss Whitney had learned "what constituted the real substance of the state's case." It was in part precisely because this preliminary examination had dealt only with the con-

vention of November 9th while the information fixed the date of the offense as more than two weeks later that Miss Whitney was unable to know what was the occasion of the offense with which she was charged (see affidavit for bill of particulars, record, pages 61-62).

* * * * * * *

The contention that the endeavor of plaintiff-in-error is "to have this Court weigh the evidence rather than adjudicate the validity of the statute" (Defendant-in-error's brief on rehearing, page 4) shows a misapprehension as to the right of review in this court. The rule that the decision of a State Court upon a question of fact will not ordinarily be reviewed here is subject to "two equally well-settled exceptions; (1) where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts" (*Aetna Life Ins. Co.* vs. *Dunken*, 266 U. S., 389, page 394, citing *Northern Pacific Ry. Co.* vs. *North Dakota*, 236 U. S., 585, 593; *Truax* vs. *Corrigan*, 257 U. S., 312, pages 324-5). This case falls within both these exceptions.

The conviction should be reversed and the plaintiff-in-error discharged.

Dated, March 12, 1926, and respectfully submitted.

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On the brief.

APPENDIX.

California Penal Code:

Sec. 1246. *Papers to be transmitted to Appellate Court. Copy to defendant and District Attorney.* Upon the appeal being taken, the clerk of the court from which the appeal is taken must, without charge, within twenty days thereafter transmit to the Clerk of the Appellate Court a typewritten copy of the following papers:

1. The indictment, information or accusation;

2. A copy of the minutes of the plea;

3. A copy of the minutes of the demurrer;

4. A copy of the demurrer;

5. A copy of the minutes of the trial;

6. A copy of other minutes of the action, including the proceedings on motion for arrest of judgment or new trial;

7. A copy of the written charges given by the Court to the jury, or refused, or modified and given; also a transcript of any oral charge;

8. A copy of the judgment;

9. Any written or printed exhibits offered in evidence at the trial of the cause.

The clerk of the court from which the appeal is taken must also, within the time above specified,

deliver, without charge, to the defendant or his attorney, upon application therefor, a carbon copy of the original transmitted to the Clerk of the Appellate Court; and must also deliver, without charge, a carbon copy to the District Attorney upon his application therefor. (Amendment approved 1909; Stats. 1909, page 1087.)

Sec. 1247. *Settlement of grounds of appeal.* Upon an appeal being taken from any judgment or order of the Superior Court, to the Supreme Court or to a District Court of Appeal, in any criminal action or proceeding where such appeal is allowed by law, the defendant, or the District Attorney when the People appeal, must, within five days, file with the clerk and present an application to the trial Court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken.

The Court shall, within two days after the filing of such application make an order directing the phonographic reporter who reported the case to transcribe such portion of his notes as in the opinion of the Court may be necessary to fairly and fully present the points relied upon by the appellant. If the Court fails to make the order within two days after the application is filed, the notes requested in the application shall be transcribed

without such order. The phonographic reporter shall, within twenty days after the filing of such application, file with the clerk of the court an original transcription and three carbon copies of the portion of the notes so required to be transcribed, excluding therefrom all argument of counsel not objected to at the time it was made. The same shall be typewritten as prescribed by the rules of the Supreme Court. He shall append to the original and to each copy his original affidavit that is correct. (Amendment approved 1911; Stats. 1911, page 692.)

No. [redacted]3 10

October Term, 1924.

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLOTTE ANITA WHITNEY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE
STATE OF CALIFORNIA,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION ONE,
STATE OF CALIFORNIA

BRIEF OF DEFENDANT IN ERROR

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1924.

No. 375.

CHARLOTTE ANITA WHITNEY,
Plaintiff in Error,
vs.
THE PEOPLE OF THE
STATE OF CALIFORNIA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

Plaintiff in error was charged by information, filed by the district attorney of the county of Alameda, State of California, with violating the Criminal Syndicalism Act of California (Statutes 1919, page 281) on five separate counts based upon the several subdivisions of said act. The jury found her guilty as charged in the first count, but disagreed as to the others, as to which dismissals were subsequently filed. The first count, and the only one involved in this proceeding, charged plaintiff in error, in the language of the statute, with wrongfully, deliberately and feloniously organizing and

assisting in organizing and knowingly becoming and being a member of an organization and group of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism.

From the judgment of conviction, she appealed to the District Court of Appeal of the State of California, as the result of which her conviction was affirmed.

People vs. *Whitney,* 57 Cal. App. 449; 207 Pac. 69. (Rec. pp. 2 to 4.)

Thereafter she petitioned to have said cause heard by the Supreme Court of the State of California, which petition was denied by the court, with but two of the seven justices dissenting, and not three as erroneously stated by counsel for plaintiff in error. Incidentally any question that the dissenting justices may have had, could only have been as to the facts, *i. e.,* sufficiency of the evidence, for these same justices theretofore and since have concurred in decisions wherein the constitutionality of the act and the very questions here presented were decided adversely to the contentions of plaintiff in error.

See

In Re McDermott, 180 Cal. 783; 183 Pac. 437;
Whitney vs. *Superior Court,* 182 Cal. 114; 187 Pac. 12;
People vs. *Taylor,* 187 Cal. 378; 203 Pac. 85;
People vs. *Steelik,* 187 Cal. 361; 203 Pac. 78.

Plaintiff in error upon her trial and appeal admitted that she joined the Communist Labor Party

of California, taking an active part in its organization and proceedings, and serving upon its Resolutions Committee. As said in the opinion of the state court in *People* vs. *Whitney, supra*:

> "Upon the main question, however, as to the part which the defendant took in organizing and assisting to organize the Communist Labor Party, there is no dispute. In the brief of the appellant upon this appeal it is stated to be an '*admitted fact* that the defendant became a member of the so-called Communist Labor Party, attended a party convention Nov. 9th, 1919, and was *one of the committee on resolutions which reported the platform* herein above set forth.' In addition to the foregoing admission the evidence abundantly shows that the defendant not only took a leading and active part in the organization of the Oakland branch of the Communist Labor Party of California, but also in the subsequent meetings and acts of said organization." (Rec. pp. 3 and 4.)

The *constitution* of the COMMUNIST LABOR PARTY OF CALIFORNIA to which she subscribed provides in part as follows:

> "Section 1. The name of this organization shall be the Communist Labor Party of California. It shall be *affiliated with the Communist Labor Party of the U. S. of America* and subscribe to its program, platform and constitution. Through this affiliation it shall be *joined with the Communist International at Moscow.*" (Rec. p. 159.)

The conclusion is unescapable that one who merely became a member of the Communist Labor Party of California thereby became affiiliated with and subscribed to the constitution of the "Communist Labor Party of America" which, among other things, provides:

> "The Communist Labor Party of America declares itself in complete accord with the principles of communism as laid down in the Manifesto of the Third International formed at Moscow. (Rec. p. 172.)
>
> * * * * * * *
>
> The working class must organize and train itself for the capture of state power. (Rec. p. 172.)
>
> * * * * * * *
>
> The years of Socialist activity on the political field have brought no increase of power to the workers. Even the million votes piled up by the Socialist Party without any proportionate representation. The Supreme Court, which is the only body in any government in the world with power to review legislation passed by the popular representative assembly, would be able to obstruct the will of the working class, even if Congress registered it, which it does not. The Constitution, framed by the capitalist class for the benefit of the capitalist class, can not be amended in the workers' interest, no matter how large a majority may desire it. * * * (p. 173.)

Not one of the great teachers of scientific Socialism has ever said that it is possible to achieve the Social Revolution by the ballot.

7. However, we do not ignore the value of voting, or of electing candidates to public office—so long as these are of assistance to the workers in their economic struggle. Political campaigns, and the election of public officials, provide opportunities for showing up capitalist democracy, educating the workers to a realization of their class position, and of demonstrating the necessity for the overthrow of the capitalist system. But it must be clearly emphasized that the chance of winning even advanced reforms of the present capitalist system at the polls is extremely remote; and even if it were possible, these reforms would not weaken the capitalist system. (Rec. p. 174.)

In any mention of revolutionary industrial unionism in this country, there must be recognized the immense effect upon the American Labor movement of the *propaganda* and *example* of the INDUSTRIAL WORKERS OF THE WORLD, whose long and *valiant* struggles and *heroic* sacrifices in the class-war have earned the respect and affection of all workers everywhere. We greet the revolutionary industrial proletariat of America, and *pledge them our wholehearted support* and cooperation in their struggles against the capitalist class." (Rec. p. 176.)

The foregoing demonstrates that plaintiff in error and all others who subscribed to the foregoing thereby strongly endorsed and lauded "the propaganda and example of the Industrial Workers of the World." That her endorsement was not merely constructive, but active and real, is shown in the evidence to the effect that she was seen at the I. W. W.

headquarters in San Francisco (Rec. p. 274), and also the headquarters of the Defense Committee of the "I. W. W." prisoners at Sacramento. (Rec. pp. 281 and 282.)

As illustrative of the "propaganda and example" which were thus adopted by endorsement, we quote from "People's Exhibit No. 30 * * * 'Sabotage,' by Walker C. Smith."

> " 'Sabotage is a mighty force as a revolutionary tactic against the repressive forces of capitalism, whether those repressions be direct or through the State.
>
> "It is guerilla warfare," is another cry against sabotage. Well, what of it? Has not guerilla warfare proven itself to be a useful thing to repel invaders and to make gains for one or the other of the opposing forces? Do not the capitalists use guerilla warfare? Guerilla warfare brings out the courage of individuals, it develops initiative, daring, resoluteness and audacity. Sabotage does the same for its users. It is to the social war what guerillas are to national wars. If it does no more than awaken a portion of the workers from their lethargy it will have been justified. But it will do more than that; it will keep the workers awake and will incite them to do battle with masters. It will give added hope to the militant minority, the few who always bear the brunt of the struggle.
>
> The saboteur is the sharpshooter of the revolution. * * * But he knows that loyalty to the employer means treason to his class. Sabotage is the smokeless power of the social war. It scores a hit, while its source is seldom detected. It is

so universally feared by the employers that they do not even desire that it be condemned for fear slave class may learn still more its great value.' " (Rec. p. 253.)

The record in this case setting forth the organization of the Communist Labor Party of California in which plaintiff in error participated, and the activities of the so-called I. W. W. in California, whose sabotage and crop destruction were endorsed as aforesaid, is quite voluminous, but it is unnecessary to further discuss the evidence in this case for its sufficiency is not involved in this proceeding, and the brief portions of the record above adverted to have been referred to merely to illustrate the character of the organization of which plaintiff in error was one of the founders, as well as its precepts and purposes.

We shall content ourselves with merely quoting the following summary of the court below:

"As to the knowledge which the defendant had and of her participation in the aims, expressions and activities of the Communist Labor Party of California there can also be no doubt in view of the admitted intelligence of the defendant and of her participation in the drafting of the resolutions and formulation of the constitution of the organization itself. That this defendant did not realize that she was giving herself over to forms and expressions of disloyalty and was, to say the least of it, lending her presence and the influence of her character and position as a woman of refinement and culture to an organization whose

purposes and sympathies savored of treason, is not only past belief but is a matter with which this court can have no concern, since it is one of the conclusive presumptions of our law that a guilty intent is presumed from the deliberate commission of an unlawful act. (C. C. P. Sec. 1962.)"

People vs. *Whitney, supra.* (Rec. p. 4.)

History and Purposes of the Act.

In construing a statute, the court must, as nearly as possible, place itself in the position of the legislature, and from contemporary facts determine the cause and necessity for the statute, and the evils sought to be remedied, and so interpret it as to suppress the mischief and advance the remedy.

Board of Commissioners vs. *Given,* 82 N. E. 918; 169 Ind. 468;
Newgirg vs. *Black,* 174 Ia. 636; 156 N. W. 708;
Washington Term. Co. vs. *Dist. of Columbia,* 36 App. D. C. 186.

It is unnecessary to discuss at length the history or activities of the *syndicalistic* organizations in this state or elsewhere. As well said in—

People vs. *Lesse,* 52 Cal. App. 280; 199 Pac 46,

"the purposes of the I. W. W. are a part of the current history of the day—a part of the history of the times. We are informed by the magazines, encyclopedias and dictionaries of the day that the organization advocates criminal syndicalism, revolutionary violence and sabotage."

In California the I. W. W. first began to make itself felt as a force by its means of sabotage and terrorism, a decade ago. Our judicial history shows that in 1913 two leaders of the I. W. W., Ford and Suhr, fomented a riot among some twenty-three hundred hop pickers in Yuba County, as a result of which the district attorney and a deputy sheriff were slain and two other officers severely injured.

People vs. *Ford*, 25 Cal. App. 388; 143 Pac. 1075;
People vs. *Suhr*, 25 Cal. App. 805; 143 Pac. 1088.

Subsequent to the affirmance of the convictions of Ford and Suhr, anonymous demands were sent the Governor of the state, threatening sabotage upon the agricultural properties of the state if they were not liberated from prison. (Rec. p. 231.)

The record in the present case devotes many pages to the activities and tactics used by the said I. W. W., such as the declaration by Lambert, the secretary, that "if it was necessary they would burn up the whole State of California." (Rec. p. 259.) This same person made a written report to the I. W. W. convention that it cost the State of California eight millions of dollars to keep Ford and Suhr in jail. (Rec. p. 231.) The record shows that they used incendiary bombs (Rec. p. 265); burned barns and haystacks (Rec. p. 266); poisoned cattle with cyanide potassium, and put lye in the shoes of men who would not join them (p. 271).

Immediately following the armistice and coincident with the revolution and success of the Red Army in

Russia, further outbreaks occurred as a result of which the Criminal Syndicalism Law was adopted being modeled upon a similar law in Minnesota. Concerning the purpose of this statute, Mr. Justice Waste, in one of the first cases on this subject in this state, declared:

> "The design and purpose of the legislature in the enactment of the statute was the suppression of what was deemed by the lawmakers a growing menace to law and order in the state, arising from the practice of sabotage and other unlawful methods of terrorism employed * * * in furtherance of industrial ends and in adjustment of alleged grievances against employers. The facts surrounding the practice of sabotage, and like *in terrorem* methods of self-adjudication of alleged wrongs, are matters of common knowledge and general public notoriety of which the courts will take notice. That they are unlawful and within the restrictive power of the legislature is clear. Sabotage, as practiced by those advocating it as an appropriate and proper method of adjusting labor troubles, embraces, among other lesser offense acts, the willful and intentional injury to or destruction of the property of the employer in retaliation for his failure or refusal to comply with wage or other kindred labor demands. It amounts to malicious mischief and is a crime at common law as well as by statute. * * * It requires no argument to demonstrate that the subject matter of this statute was and is within legislative cognizance, vesting in that body the clear right to prohibit the advocacy or teach-

ing of the iniquitous and unlawful doctrines which it condemns. (*State* vs. *Moilen*, 140 Minn. 112, 114 (1 A. L. R. 331, 167 N. W. 345, 346).)"
People vs. *Malley*, 49 Cal. App. 597; 194 Pac. 48.

Questions Involved.

Plaintiff in error makes but two points:

First, that the statute is void for indefiniteness; and,

Second, that it denies equal protection of the laws.

First Point.

THE STATUTE IS NOT VOID FOR INDEFINITENESS.

A penal statute is sufficiently certain, although it may use general terms, if the offense is so defined as to convey to a person of ordinary intelligence an adequate description of the evil intended to be prohibited.

State vs. *Brown*, 108 Wash. 205, 182 Pac. 944;
People vs. *Carroll*, 80 Cal. 153, 22 Pac. 129;
In re O'Shea, 11 Cal. App. 568, 105 Pac. 776;
Smith vs. *State* (Ind.), 115 N. E. 943;
People vs. *Coon*, 67 Hun. 523;
State vs. *Lawrence* (Okla.), 130 Pac. 508;
Evans vs. *State*, 22 S. W. 18;
Cazarra vs. *Dist. of Columbia Medical Suprs.*, 25 Cal. App. (D. C.) 443;
Stewart vs. *State*, 4 Okla. Cr. 564; 109 Pac. 243;
Nash vs. *U. S.*, 229 U. S. 373, supp. 377;
Waters-Pierce Oil Co. vs. *Texas*, 212 U. S. 86;
Omaechevarria vs. *Idaho*, 246 U. S. 343;
U. S. vs. *U. S. Brewers' Assn.*, 239 Fed. 163;

Similar Cases.

Criminal syndicalism laws or statutes of the same nature have been held valid in many jurisdictions, and convictions thereunder upheld.

California:

People vs. *Steelik*, 187 Cal. 361; 203 Pac. 78;
People vs. *Taylor*, 187 Cal. 378; 203 Pac. 85;
In re McDermott, 180 Cal. 783; 183 Pac. 437;
Whitney vs. *Superior Court*, 182 Cal. 114; 187 Pac. 12;
People vs. *Malley*, 49 Cal. App. 597; 194 Pac. 48;
People vs. *Whitney*, 57 Cal. App. 449; 207 Pac. 698;
People vs. *Lesse*, 52 Cal. App. 280; 199 Pac. 46;
People vs. *Wieler*, 55 Cal. App. 687; 204 Pac. 410;
People vs. *Welton*, 211 Pac. 802;
People vs. *Casdorf*, 212 Pac. 237;
People vs. *La Rue*, 216 Pac. 627;
People vs. *Roe*, 209 Pac. 381;
People vs. *Sherman*, 209 Pac. 1023;
People vs. *Sanchez*, 206 Pac. 760

Connecticut:

State vs. *Sinchuck*, 115 Atl. 33.

Idaho:

State vs. *Dingman*, 219 Pac. 760.
(Reversed by divided court on evidentiary error.)

Iowa:

State vs. *Tonn*, 191 N. W. 530.

Illinois:

People vs. *Lloyd*, 136 N. E. 505.

Kansas:

State vs. *Berquist*, 199 Pac. 101;
State vs. *Breen*, 205 Pac. 632;
State vs. *I. W. W.*, 214 Pac. 617 (Injunction).

Minnesota:

State vs. *Moilen*, 167 N. W. 345;
State vs. *Workers etc. Pub. Co.*, 185 N. W. 931.

New York:

People vs. *Gitlow*, 234 N. Y. 132; 136 N. E. 317;
People vs. *Ferguson*, 234 N. Y. 159; 136 N. E. 327.

(Not a syndicalism but an anti-anarchy law involved in these cases.)

Oregon:

State vs. *Laundy*, 103 Ore. 443; 204 Pac. 958; 206 Pac. 290.

(Reversed on procedural error.)

Pennsylvania:

Com. vs. *Blankenstein*, 81 Pa. Super. Ct. 340. (Sedition Act.)

Washington:

State vs. *Hennessy*, 195 Pac. 211;
State vs. *Hemhelter*, 196 Pac. 581;
State vs. *Payne*, 200 Pac. 314;
State vs. *Kowalchuk*, 200 Pac. 333;
State vs. *Aspelin*, 203 Pac. 964.

That the meaning of this act is clear and definite is apparent from the following analysis thereof made by former Chief Justice Wilbur of the Supreme Court of California in the case of *People* vs. *Steelik*, 187 Cal. 378; 203 Pac. 78:

> "Appellant attacks the constitutionality of the statute because it denounces acts and conduct 'as a means' of accomplishing political change or change in industrial ownership, thus leaving to a court or jury to determine whether or not the particular act or conduct of the defendant is adapted to the result denounced by the statute. In considering that question it should be noted that the Criminal Syndicalism Act does not undertake to define the various acts, the advocacy of which is punishable under the statute. Such acts are *already denounced as wrongful under existing laws.* They are (1) the 'commission of crime,' (2) 'wilful and malicious physical damage to physical property,' (3) 'unlawful acts of force and violence,' (4) 'unlawful methods of terrorism.' We must look to the general law of the state to determine what are 'unlawful acts of force and violence,' and what are 'unlawful methods of terrorism,' and to ascertain what acts are crime. The 'malicious physical damage to physical property' is evidently synonymous with malicious mischief and arson, and other unlawful acts resulting in the damage to or destruction of physical property. These wrongful acts, most of them already punishable by the criminal law, are denounced by the statute and made felonious when done, or advocated as a means of political or in-

dustrial change. The Criminal Syndicalism Act might be summarized as an act to punish the advocacy of crime or wrong, engaging in conspiracies to commit crime or unlawful acts, or the commission of crime or unlawful acts as a means of changing industrial or political control. It is proper to seek desired changes in political and industrial control, but when criminal or unlawful means are used to effect political control, the means is punishable under the act defining and prohibiting criminal syndicalism, as well as under the act defining the crime. The latter act is no more uncertain than the one denouncing criminal conspiracy as a conspiracy to commit any act 'injurious to the public health' 'or to public morals' or the 'perversion and obstruction of justice' 'or due administration of the laws.' (Sec. 182, Pen. Code.) * * * " (Our italics.)

This same contention is refuted in another California case, *People* vs. *Wieler*, 55 Cal. App. 687; 204 Pac. 410, as follows:

"In this same connection it is contended that the statute is void for indefiniteness. Counsel rests this objection on the fact that the statute does not define 'crime,' 'unlawful method of terrorism,' 'terrorism,' 'justify,' 'change in industrial ownership or control,' 'political,' etc. If any difficulty arises in the interpretation of the statute, and it becomes necessary to ascertain the meaning of those words, the decisions and code provisions contain numerous passages to assist the courts and there is no constitutional require-

ment that such rules be provided within the bounds of each particular statutory enactment."

The words "aiding and abetting the commission of crime," "sabotage" (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), and "unlawful acts of force and violence" have a meaning so clear and definite that no reasonable person can fail to understand the same. That is "unlawful" which is expressly prohibited by law.

The word "sabotage" is expressly defined by the legislature in the act itself, as just seen. The phrase "unlawful methods of terrorism" is clear, and means just what its language imports. It would be difficult, if not impractical, to express this meaning more clearly. It includes any unlawful acts that would have the tendency to strike terror into the hearts of people for the purpose of breaking down their opposition to the proposed political or industrial change. The term "terrorism" is defined as follows:

> "The act of terrorizing, or state of being terrorized; a mode of government by terror or intimidation.."
>
> (Webster's International Dictionary.)

In this connection we desire to compare our California statute on extortion. Section 518 of the Penal Code of California declares: "Extortion is the obtaining of property from another with his consent induced by a wrongful use of force or *fear*, or under

color of official right." Section 519, following, declares: "Fear, such as will constitute extortion, may be induced by a threat, either: 1. To do an unlawful injury to the person or property of the individual threatened, * * *; or, 2. To accuse him, or any relative of his, * * * of any crime; or, 3. To expose, or impute to him or them any deformity or disgrace; or, 4. To expose any secret affecting him or them."

"Terrorism" is but a species of fear. "Fear," it is true, is a very general term, yet everyone knows what it means. The California legislature does not attempt to define the meaning of the word "fear," but confines itself to certain *causes* of fear, or, rather, certain fears which are induced as above stated. Observe the generality of the terms used in the statute above quoted, viz: "unlawful injury to * * * person or property," "any crime," "any deformity or disgrace," and, finally, "any *secret.*" These terms are much broader than those found in the syndicalism statute, and yet no one has ever questioned the legal sufficiency of the California extortion law.

Likewise in the state of Washington its criminal syndicalism law was sustained against a similar attack in a very able opinion rendered in

State vs. *Hennessy,* 195 Pac. 211.

The court there said in part:

"The sixth point is that the statute is void for

indefiniteness. In *State* vs. *Fox,* 71 Wash. 185, 127 Pac. 1111, *supra,* the same objection was made to the statute there being construed. * * *

In *State* vs. *Brown,* 108 Wash. 205, 182 Pac. 944, one of the questions was whether the statute which made it a misdemeanor for any person to drive or propel a vehicle upon any public street or highway which without its load should be of such weight as to destroy or permanently injure such street or highway was void for indefiniteness. It was there said:

'The objection to the statute is that it does not definitely and clearly define the offense intended to be denounced by it. It is argued that a statute to be free from the objection of indefiniteness and uncertainty must be so far specific that a person may know in advance whether his act will or will not be a violation of the statute, and that this statute is not thus specific, since the operator of the vehicle can not know until he actually makes the trial whether the load will or will not permanently injure the highway. In other words, the contention is that a statute, to be free from the objection, that it is indefinite and uncertain, must specifically point out the acts which constitute the crime, not merely prohibit results produced by acts. But such is not the rule. The legislation in creating an offense may define it by a particular description of the acts constituting it, or it may define it as an act which produces, or is reasonably calculated to produce, a certain defined or described result. 16 C. J. 67. If this were not so, it would be easy to find many statutes now upon the books which are open to the objection of

uncertainty, but which have heretofore never been suspected of that fault. As illustrations: the statutes making it an offense to wilfully disturb any religious meeting (Rem. Code, Sec. 2499), any assembly or meeting not unlawful in its character (Id., Sec. 2547), or any school meeting (Id., Sec. 4697), or the legislature, or either house thereof (Id., Sec. 2337), are all statutes which do not specify the particular acts which will constitute the disturbance; yet no case can be found where they have been held invalid for that reason, while there are many which have allowed convictions thereunder to stand. Other illustrations, without specifically enumerating them, can be found in the statutes against malicious mischief, injury to public utilities, injuries to property, the statutes defining and punishing vagrancy, obstructing an officer in the discharge of his duty, publishing articles tending to excite crime, or a breach of the peace, and the like, all of which define the crime by the result it produces rather than by the specific acts constituting the offense.'

The act now before us is no more indefinite than were the statutes which were before the court in those cases; to hold that the syndicalism act is void for indefiniteness would require a modification of the holding in the cases just cited and especially in the *Brown* case. The act is not void for indefiniteness."

A reading of the case just quoted will disclose that it not only cites more than once, but quotes from, and is indeed largely based on the earlier Washington case of

State vs. *Fox*, 71 Wash. 185; 127 Pac. 1111.

In that case a statute which in the most general and embracing language prohibited the publication of anything that had a "tendency to encourage * * * the commission of *any crime*, breach of the peace * * * or which shall intend to encourage or advocate disrespect to law" was held to be definite and valid.

This brings us to the point that we think is determinative of this case, and that is, that the *Fox* case was taken to this, the United States Supreme Court, which affirmed the decision of the Washington court, in

Fox vs. *Washington*, 236 U. S. 273.

Mr. Justice Holmes, who delivered the opinion of the court, declared in part as follows:

> "This is an information for editing printed matter tending to encourage and advocate disrespect for law contrary to a statute of Washington. The statute is as follows: 'Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of *any crime*, breach of the peace or act of violence, or which shall tend to *encourage* or advocate *disrespect for law* or for any court or courts of justice, shall be guilty of a gross misdemeanor'; Rem. and Bal. Code, Sec. 2564.

The defendant demurred on the ground that the act was unconstitutional.

* * * * * * *

So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; *United States* vs. *Delaware & Hudson Co.*, 213 U. S. 366; 407, 408; and it is to be presumed that state laws will be construed in that way by the state courts. We understand the state court by implication at least to have read the statute as confined to encouraging an actual breach of law. Therefore, *the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail.* It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general. In this present case the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act. It would be in accord with the usages of English to interpret disrespect as manifested disrespect, as active disregard going beyond the line drawn by the law. That is all that has happened as yet, and we see no reason to believe that the statute will be stretched beyond that point.

If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness. See *Nash* vs. *United States*, 229 U. S. 373. *International Harvester Co.* vs. *Kentucky*, 234 U. S. 216. It lays hold of encouragements that, apart from statute, if

> directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor if not an accomplice or a principal in the crime encouraged, and deals with the publication of them to a wider and less selected audience. Laws of this description are not unfamiliar. Of course we have nothing to do with the wisdom of the defendant, the prosecution, or the act. All that concerns us is that it can not be said to infringe the constitution of the United States. Judgment affirmed." (Italics ours.)

In line with the foregoing decision, it will be noted that the Supreme Court of California in the *Steelik* case above quoted has construed the statute in question as limited to the commission or encouragement of such acts as "are already denounced as wrongful under existing laws." Further along it declares,

> "We must look to the general law of the state to determine what are 'unlawful acts of force and violence' and what are 'unlawful methods of terrorism,' and to ascertain what acts are crime."

In a word, the language of the statute, as well as that of the highest court of the state in construing it, shows that the term "criminal syndicalism" is limited to acts which are in themselves *unlawful.* Moreover, the California Supreme Court in considering an ordinance of the city of Los Angeles, in conjunction with the criminal syndicalism law, held the former invalid, because it was not limited to positive acts of unlawfulness, as was the latter; and expressly recognized the right of every person, individually or

collectively, to advocate changes in our form of government by any *peaceable* or lawful means.

> "* * * Nothing would seem to be more certain than that the inhabitants of the United States have both individually and collectively the right to advocate peacable changes in our constitution, laws, or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis. And it seems equally certain that an organization peacably advocating such changes may adopt a flag or emblem signifying its purpose, and that the display or possession of such flag or emblem, can not be made an unlawful act."
>
> *In Re Hartman*, 182 Cal. 447–449.

The foregoing case clearly differentiates the California statute from that of New Mexico, which was held invalid (*People* vs. *Diamond*, 202 Pacific 988) because it included within its prohibition every peaceful act having for its object a change in government.

Not only is the application of the California syndicalism statute, by judicial construction, confined to acts which are unlawful, but it is likewise limited in other respects. For instance, it has been held that where the charge of criminal syndicalism is based upon subdivisions 1, 2, 3 and 5 of section 2, the acts enumerated in said subdivisions must be pleaded with a degree of particularity that will impart to the accused precise information of the acts with which he is charged, and which, with the evidence adduced,

sustaining such charge, upon conviction, will operate as a bar to another prosecution for the same acts, with the exception that, where the charge is the violation of subdivision 4, as here (becoming a member of a syndicalistic organization), a charge in the language of said subdivision is sufficient.

People vs. *Taylor, supra;*
People vs. *Roe, supra.*

It has also been held "that knowledge of the purposes of the organization is an essential element of the crime here charged," and "that honest mistake as to the nature of the purposes of the organization is a good defense."

People vs. *Flannagan,* 223 Pac. 1014;
People vs. *Thornton,* 219 Pac. 1020.

Cases Distinguished.

The principal case cited by plaintiff in error on this first point is that of

U. S. vs. *Cohen Groc. Co.,* 41 S. C. 298; 65 L. Ed. 560; 255 U. S. 81.

This case distinguishes itself. The statute there considered was known as the Food Control or Lever Act, providing:

> "That it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, * * *"

Said this court:

> "* * * to attempt to enforce the section would

> be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest and unreasonable in the estimation of the court and jury."

As illustrative of the vice of such a statute, this court cites, in a footnote to the above decision, a number of cases involving prosecutions under this act, wherein it appears that no two courts gave it the same interpretation, but such demonstration is unnecessary, when it is considered that the adjective "unreasonable" has no limitation of meaning, but is obviously a word of general approximation. The word is subjective in that its meaning depends upon what anyone who reasons thinks about the matter, and as no two intellects function exactly the same, the connotation of the term is conceivably as various as the number of minds considering the matter.

Likewise is the *Lantz* case (90 W. Va. 738) distinguishable, because the statute there had the same vice in that it penalized the operation of automobiles around curves without reducing the speed to a *reasonable* or proper rate.

So too has our California Supreme Court held a provision in a medical practice act prohibiting "grossly improbable statements" in advertising void;

> *Hewitt* vs. *Board of Medical Examiners,* 148 Cal. 590;

and an information deficient which merely charged that the defendant did "defraud" another.

People vs. *McKenna*, 81 Cal. 158.

The court in the *Hewitt* case, *supra*, indicated that if the statute had prohibited a "false" statement it would have been sufficient, viz:

> "Under this provision the penalty of forfeiture of a physician's license is not made to depend upon falsity in fact of any matter contained in a statement or knowledge on the part of the physician that it is false, or for the reason that it was intended or had a tendency to deceive the public or to impose upon credulous or ignorant persons, and so be harmful and injurious to public morals, health and safety."

In the *Todd* (158 U. S. 278), *Brewer* (139 U. S. 228) and *Reese* (92 U. S. 214) cases cited by plaintiff in error we do not find any statute declared void for *indefiniteness*, but merely an abstract statement of principles with which we are in full accord.

In addition to what is said in the cases above quoted, as well as those merely cited, it is manifest that all penal statutes are, and indeed to be constitutional, must be, very general in their terminology. Each embraces a variety of acts or combination of circumstances. Consider the multitudinous methods in which homicide, false pretenses, embezzlement, larceny by trick and device, extortion, etc., may be committed. Observe the generality of statutes defining treason, criminal conspiracy, malicious mischief,

disturbing the peace, and crime against nature. Compared with the "Espionage Act," "Sherman Act," and "Mann Act," the statute of the type here considered is a model of exactitude, and it is significant that no court to this date has appeared to have had any difficulty in determining its *meaning*, whatever may have been the evidential, constitutional, and procedural questions raised and passed on.

The Information.

If, as established by the many foregoing authorities, this statute and similar statutes are constitutional, they do not become invalid by reason of the fact that any indictment or pleading thereunder might happen to be deficient. Therefore, it would appear that that portion of the argument of plaintiff in error which is devoted to a criticism of the sufficiency of the information in this case is outside the question here involved. In passing, it should be said that the same attack on the sufficiency of the information, including most of the cases cited, was made in the state courts both in this case and other cases, with a conclusion adverse to the plaintiff in error.

People vs. *Whitney, supra*;
People vs. *Malley, supra*;
People vs. *Roe, supra.*

It will be seen from the cases just cited that under the construction of the California courts it is necessary that the charges based upon subdivisions 1, 2, 3 and 5 of section 2 of the statute be pleaded with a

degree of particularity that will impart to the accused precise information of the acts with the commission of which he is charged, and where, as here, the charge involved relates solely to a violation of subdivision 4 of said section, in organizing and becoming a member of a group of persons assembled to advocate or aid and abet criminal syndicalism, it is sufficient to charge the crime in the words of the statute. As said in *People* vs. *Roe, supra* (209 Pac. 381 at 383):

> "* * * where the charge is the violation of subdivision 4, the statement in the indictment or information is sufficient if it is in the language of said subdivision, *since the acts therein denounced as acts of criminal syndicalism are sufficiently described by the language itself of said subdivision to make it perfectly clear what was thereby intended.*" (Our italics.)

In other words, charging a person with becoming a member of a syndicalistic organization such as defined in the statute here in question is a direct allegation of a definite fact, for *membership* is a very concrete fact. Thus if anyone in California is charged with *becoming a member* of a syndicalistic organization defined in this statute, he well knows what a charge he is called upon to meet. He knows that the main issue confronting him is whether he *did* or did *not* join an organization of that character. *Joining* is itself an act—an overt act. To charge that a person joined such an organization involves but three issues of fact—first, the joining, second, that

the organization was of the character prohibited by the act, and third, knowledge of its character. It would therefore necessitate pleading the evidence if the state were required, under said subdivision 4 of section 2 of the act to plead, in addition to the fact of joining an organization of the character described in this statute, the further activities of the defendant after he or she became a member as well as the activities of the organization itself.

"Due Process" in California.

In the determination of what constitutes "due process of law" in California, there must also be taken into consideration a notable addition to the constitution of California in the year 1910 in section 4½ of article VI:

> "No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or *for error as to any matter of pleading,* or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in *a miscarriage of justice.*"

This amendment had such a salutary effect upon law enforcement in California, that the people amended the statute in 1914 to include not only criminal but civil and all other cases as well, and this section now reads as above quoted with the word "criminal" deleted. Thus, in determining whether

or not prejudice was suffered by a defendant in a given case by reason of the form of the pleading, the appellate tribunals of this state consider not merely the face of the information itself, but read it in the light of the whole record. So it was that the court, in the case of *People* vs. *Whitney, supra* (57 Cal. App. 449, 451) declared:

> "Since the original submission of this cause the supreme court has decided the case of *People* vs. *Taylor,* 187 Cal. 378 (203 Pac. 85), covering the precise point which the appellant urges upon this contention. The two cases are identical as to the form of the charge and as to the procedure with relation to the trial thereon in the trial court. In each case the defendant was fully advised upon the *voir dire* examination of the jurors and in the opening statement of the district attorney that the organization which the defendant was charged with having organized and assisted in organizing in violation of the terms of the Criminal Syndicalism Act was the Communist Labor Party of Oakland, a local branch of the Communist Party of California. This being so, we are bound in conformity with the decision in *People* vs. *Taylor, supra,* to hold that the appellant's first contention is void of merit."

Second Point.

THE STATUTE DOES NOT DENY EQUAL PROTECTION OF THE LAWS.

Plaintiff in error contends that the statute in question denies equal protection of the laws because it applies only to those who commit the acts in question

for the purpose of effecting a *change,* and does not include those who do the same things to maintain an industrial or a political condition.

The equal protection of the laws is secured where the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.

Duncan vs. *Missouri,* 152 U. S. 382;
Atchison, etc. R. Co. vs. *Mathews,* 174 U. S. 104;
McPherson vs. *Blacker,* 146 U. S. 39.

A mere statement of the above proposition would seem to be determinative of this question. Manifestly this statute applies to all persons who do the things therein denounced. It is not limited in its language or effect to employees, but includes employers; it is not confined to laborers, but includes capitalists as well; it makes no distinction between the poor "wobbly" and the rich communist. The present case is proof of this, for the record shows, and it is asserted in the opening brief (p. 2), that plaintiff in error "is a woman of refinement and culture * * * once possessed of wealth" This same point was thus disposed of in

People vs. *Wieler,* 55 Cal. App. 687:

"Counsel for plaintiff points out that the act of April 30, 1919 (Stats. 1919, p. 281), and known as the criminal syndicalism law, penalizes certain acts done to accomplish an industrial or political change, but does not penalize the same acts if done for the purpose of maintaining and perpetuating

the same industrial or political condition. In other words, the attack is that certain things could have been penalized which have not been penalized. The same identical argument was made in the case entitled *In re Miller,* 162 Cal. 687 (124 Pac. 427). The court was considering the act of 1911 (page 437), forbidding the employment of women for more than eight hours and had in certain places. At page 697 of 162 Cal. (124 Pac. 430) the court says: 'The next objection is that the act is special because there are no reasons for making the restriction as to the particular employments mentioned in the act which do not apply with equal force to other similar occupations. There may be, and probably are, other occupations followed by women which are equally injurious to their health, and which should also be regulated. But if this be true it does not make the law invalid. If there are good grounds for the classification made by the act, it is not void because it does not include every other class needing similar protection or regulation.'" (Pp. 689, 690.)

The Supreme Court of Washington said on this subject in

State vs. *Hennessy,* 195 Pac. 211 (at 215):

"The fourth point is that the statute is class legislation. The argument here seems to be based on the assumption that it was 'intended to restrict the discussion of economic and industrial questions among labor organizations.' There is nothing, however, on the face of the act to justify this assumption, and the court, in considering the

question, is governed by its terms. The legislature has power to pass all needful police regulations, and so long as such regulations bear with equal weight upon all in like situation or of the same class, they are upheld by the courts. *State* vs. *Fraternal Knights & Ladies,* 35 Wash. 338, 77 Pac. 500; *State* vs. *Nichols,* 28 Wash. 628, 69 Pac. 372; *State* vs. *Nicolls,* 61 Wash. 142, 112 Pac. 269, Ann. Cas. 1912B, 1088. The act is general in its terms and provides that 'whoever' shall do the things there prohibited shall be guilty of a felony. Under this language any one, no matter what his business association or professional calling might be, who did the things prohibited by the act, would be subject to its provisions."

The Minnesota Supreme Court has even more fully answered this argument in

State vs. *Moilen,* 167 N. W. 345, at 347:

"It is next contended that, since the statute is limited in its application to employer and employee, with protection only to the employer to the exclusion of all other persons, it is class legislation and a denial of the equal protection of the law, and for that reason unconstitutional and void. The point is without force. While the practice of sabotage applies only between employer and employee, the other methods of terrorism referred to in the statute in that respect has general application. But for the purposes of the case it may be conceded that the statute applies only to the relation of employer and employee, yet we have no difficulty in affirm-

ing its validity against this attack. The relation of master and servant, employer and employee, has long been the basis and foundation for specific legislation in this state, as well as in the other states of this country. And though often vigorously challenged as class legislation statutes applying only to that relation have in later years been sustained by the courts with few exceptions."

Numerous citations supporting the above contention thereupon follow.

Says the Oregon Supreme Court in

State vs. *Laundy,* 204 Pac. 958 (at 964):

"The syndicalism statute is not class legislation. It affects all alike. It does not discriminate against some or favor others."

Likewise we find the Idaho Supreme Court declaring in

State vs. *Dingman,* 219 Pac. 760 (at 764):

"Neither do we think that this statute is open to the objection of creating an unreasonable distinction between classes and persons, because it limits the offense to the advocacy of the doctrine announced as a means of accomplishing industrial and political reform, and does not, in terms, at least, make such advocacy a crime if committed for other purposes, within the act."

Plaintiff in error cites the case of

Truax vs. *Corrigan,* 257 U. S. 311,

on this point. But that case if anything is authority

for the validity of the legislation herein attacked. It holds the anti-injunction law of Arizona in labor disputes unconstitutional because it "operates to make lawful such a wrong as * * * deprives the owner of the business and the premises of his property without due process, and can not be held valid under the 14th amendment." The court further condemns "moral coercion by illegal annoyance and obstruction," for as it says "violence could not have been more effective." Be this as it may, it should be a sufficient answer to point out that this case has no application to the instant one because the statute there considered expressly referred to controversies between "employers and employees," whereas manifestly the criminal syndicalism law as above noted is not so limited, and applies to every person, irrespective of condition, employment, or class.

Free Speech Not Abridged.

Plaintiff in error without having made a direct point of it, has devoted much of her brief to the argument that the statute infringes upon the right of free speech. As to this the Supreme Court of California says in

People vs. *Steelik*, 187 Cal. at 375:

> "The right of free speech was guaranteed to prevent legislation which would by censorship, injunction, or other method prevent the free publication by any citizen of anything that he deemed it was necessary to say or publish. * * * The right of free speech does not include the

right to advocate the destruction or overthrow of government or the criminal destruction of property. The Criminal Syndicalism Act does not violate the right of free speech. * * *

It is expressly provided in our constitution that the publisher is liable for an abuse of this power and for any unlawful publication. This statute does not prevent the publication; it punishes the publisher, and declares punishable the character of publication denounced by the act as illegal. The legislature has power to punish propaganda which has for its purpose the destruction of government or the rights of property which the government was formed to preserve. (*People* vs. *Most, supra.*) It is clear that the statute does not violate the right of free speech as defined by law. (6) The defendant, however, is not in a position to raise the point, for he is not charged with or convicted of a violation of the Criminal Syndicalism Act involving anything that he said or published as hereinbefore indicated."

In *State* vs. *Boyd,* 91 Atlantic 586, at 587:

"The fundamental answer to the point raised is that free speech does not mean unbridled license of speech, and that language tending to the violation of the rights of personal security and private property, and toward breaches of the public peace, is an abuse of the right of free speech, for which, by the very constitutional language invoked, the utterer is responsible. Incitement to the commission of a crime is a misdemeanor at common law, whether the crime advocated be actually committed or not (*State* vs. *Quinlan, supra*); and this (by the weight of authority) whether the crime advo-

cated be a felony or a misdemeanor (12 Cyc. 182, and cases cited). That the right of free speech is not unlimited is well settled."

State vs. *Holm*, 166 N. W. 181, at 183:

"It is settled that the state may prohibit publications or teachings which are injurious to society, or which tend to subvert or imperil the government or to impede or hinder it in the performance of its public and governmental duties without infringing the constitutional provisions which preserve freedom of speech and of the press. These constitutional provisions preserve the right to speak and to publish without previously submitting for official approval the matter to be spoken or published, but do not grant immunity to those who abuse this privilege, *nor prevent the state from making it a penal offense to publish or advocate matters or measures inimical to the public welfare.*"

People vs. *Laundy*, 204 Pac. 958, at 965:

"The Syndicalism Act does not violate the constitutional right to speak freely nor the constitutional right to assemble peaceably."

People vs. *Lloyd*, 136 N. E. 505, at 513:

"It would be a strange constitution, indeed, that would guarantee to any man the right to advocate the destruction by force of that which that constitution guarantees to the people living under its protection."

The following observation of this court in *Schaefer* vs. *U. S.*, 251 U. S. 467, at 477, is very appropriate:

"A curious spectacle was presented: that great ordinance of government and orderly liberty was invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself. In other words and explicitly, though it empowered congress to declare war and war is waged with armies, their formation (recruiting or enlisting) could be prevented or impeded, and the morale of the armies when formed could be weakened or debased by question or calumny of the motives of authority, and this could not be made a crime—that it was an impregnable attribute of free speech upon which no curb could be put. Verdicts and judgments of conviction were the reply to the challenge and when they were brought here our response to it was unhesitating and direct. We did more than reject the contention; we forestalled all shades of repetition of it including that in the case at bar."

Citing:

Schenck vs. *U. S.*, 249 U. S. 47;
Frohwerk vs. *U. S.*, 249 U. S. 204;
Debs vs. *U. S.*, 249 U. S. 211;
Abrams vs. *U. S.*, 250 U. S. 616.

Conclusion.

Much of the "Brief for Plaintiff in Error" is devoted to political rather than legal argumentation. It is asserted that the act is "repugnant to * * * a free America," is "subversive of governmental republicanism," and "mocks the theory of democracy." On the contrary, the very purpose of the statute was and is to safeguard the rights of property from the evils of sabotage, the liberties of the individual from mass terrorism, the State and Union from insidious treason, culminating in the horrors of revolution.

It is beside the question to argue, for all agree that men can not be punished for their thoughts provided they are not translated into illegal action. No man can be tried for his opinions so long as he does not incite riots or counsel crime. As said by Mr. Justice Hart in

People vs. *Roe, supra* (209 Pac. 385, at 386):

> "While, as stated, there is no criminal purpose to be imputed to the fact of the mere advocacy of a plan for the government of the peoples of the earth which would or might bring to them what may well be termed a condition of consummate beatitude in wordly affairs, yet, when in attempting to crystallize such a condition any organization resorts to criminal acts of any character, or proposes to do it by the destruction of property and vested rights, then it has clearly

transcended the line of demarcation between right and wrong; and the vice of the whole scheme of the organization known as the I. W. W. is, according to the testimony in this case, in the methods which it advocates and to which its members without scruples resort for carrying out its principles, and as to this phase of the case the record before us overflows with proof of the most dastardly crimes known to the criminal law which were resorted to for the avowed purpose of terrorizing the people, in the vain hope of intimidating them into accepting the propaganda of the I. W. W. as the true faith in the matter of government."

To the same effect it is held in

People vs. *Lloyd*, 136 N. E. 505, at 530:

"If such a program were advocated by a few men in any community, they would be promptly arrested and punished, and no one would have the temerity to defend their acts. But plaintiffs in error seem to take the position that because their band has become so large and the nefarious doctrines they advocate have assumed world-wide proportions, it must be held to be an honest effort to reform a bad system of government. The fact that a conspiracy to commit a felony assumes tremendous proportions does not change the character of the conspiracy."

To suppress all such conspiracies and activities having as their object the overthrow of this free government, the criminal syndicalism law was enacted in

this and other states, and we respectfully submit that in its essence it is fundamentally sound and constitutional in that it stands out as one of the most effective bulwarks of the constitution itself.

Respectfully submitted.

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No. 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

CHARLOTTE ANITA WHITNEY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA.

BRIEF OF DEFENDANT IN ERROR ON REHEARING

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TABLE OF CASES CITED.

No. 10.

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BRIEF OF DEFENDANT IN ERROR ON REHEARING.

Foreword.

In view of the additional briefs filed and additional points made on behalf of plaintiff in error in recent months and subsequent to the filing of our *one* brief in this matter, which was addressed solely

to the points made in plaintiff's opening brief, we deem it our duty both to the court and to the cause to ask leave to file this supplemental argument. We shall avoid repetition of the argument made in our first brief, which was directed principally to the original and main contention of plaintiff in error, as to the alleged unconstitutionality of the California Criminal Syndicalism Act, deeming that it will be sufficient to merely refer this court to the numerous decisions therein cited with the additional authority (since decided) of

Gitlow vs. *New York*, 45 Sup. Ct. 625.

Jurisdiction.

In fairness and candor we deem it proper to state that we have entertained the view, and so intimated at the oral argument, that plaintiff in error had duly made and saved its objection to the invalidity of the *statute* itself, but *not* the unconstitutionality of its *application*. In other words, inspection of briefs filed on behalf of this plaintiff in the lower courts (reproductions of which have been recently filed herein) and her "assignments of error" will show that the only arguments made which at all impinge upon the Fourteenth Amendment are but three, to wit, (1) that the act is void for indefiniteness and the information in the language thereof insufficient; (2) that the act discriminates against those who desire a change in political and industrial conditions and favors those who oppose such change;

and (3) that the act is an abridgement of the freedom of speech.

As a confirmation of the accuracy of this statement we refer to plaintiff's "Petition for Rehearing" in this court, and more particularly pages 3 to 6 thereof, wherein counsel summarizes the arguments made on her behalf in the state appellate tribunals, from which it is manifest that the sole point of attack was upon the law itself rather than its application. Plaintiff virtually concedes this, for on page 6 of the petition just referred to it is stated that all of these points were argued in this court "and *additional arguments* were adduced supporting plaintiff's in error contention that the statute *as applied in her case* violated the due process clause of the Fourteenth Amendment." (Our italics.) This is only too true, for many months after the original briefs were filed and after the decision of the *Gitlow* case, plaintiff for the first time raised the objection of the unconstitutionality of the application of the law. The vice of such proceeding as we view it is this. It is not contended that this act has been applied any differently in plaintiff's case than that of other persons prosecuted thereunder as was properly contended in that line of cases headed by *Yick Wo* vs. *Hopkins,* 118 U. S. 356, but the object seems to be to lead us far afield into the domain of voluminous and complex facts, the weight and effect of which were and can only be determined by

our constitutional triers of fact, to wit, a jury. *The endeavor now appears to be to have this court weigh the evidence rather than adjudicate the validity of the statute.* Thus in the brief filed immediately prior to the oral argument and upon such argument, learned counsel for plaintiff presented this case to this court as to a jury, maintaining that plaintiff in error was innocent of the commission of acts upon which she was found guilty by a jury, further arguing that she was a mere passive spectator and that her criminality had been made to depend on the acts of other persons occurring both prior and subsequent to the date of the crime charged. We respectfully submit that this is ignoring the rule that decisions on question of fact by a jury can not be reviewed on a writ of error.

Dower vs. *Richards,* 151 U. S. 658;
Chicago etc. Railroad Co. vs. *Chicago,* 166 U. S. 226, 242.

"It is well settled in this court that a review of the judgment of a state court is confined to the assignments of error made and passed upon in the judgment of the state court brought here for review. The assignment of errors in this court can not bring into the record any new matter for our consideration."

Harding vs. *Illinois,* 196 U.S. 78;
Waters-Pierce Oil Co. vs. *Texas,* 212 U. S. 112.

It is not sufficient that the claim of right under

the constitution is made in the briefs or oral arguments.

Sayward vs. *Denny,* 158 U. S. 180;
Zadig vs. *Baldwin,* 166 U.S. 485.

A party who has raised only *one* federal question in the state court can not come into this court and argue *another* which was not raised in any of the courts below, even though "an inspection of the record shows the existence of facts upon which the question might have been raised."

Dewey vs. *Des Moines* 173 U. S. 193.

As we can not anticipate in advance the scope which this hearing may take, we deem it proper to now make reply *seriatim* to "Points I–X" made in the brief filed by plaintiff in error immediately preceding the last hearing of this matter. Before doing so it becomes necessary to briefly sketch the facts of this case.

The Facts.

On or about August 16, 1918, plaintiff sent a ballot to the Socialist Party in Oakland, California, of which she was then a member, in which she voted for certain radicals (Bedacht, Taylor, Ragsdale and Dolsen) as delegates to the national convention of the Socialist Party at Chicago (pp. 205–206). These delegates were among other radicals at this convention (calling themselves the "Left Wing") who bolted the Socialist Party and organized the Com-

munist Labor Party of the United States. (P. 100.) On November 8, 1919, the secretary of the "Local Oakland, Communist Labor Party," directed a letter to the "California Communist Labor Party Convention, Loring Hall, Oakland, California," reading as follows:

> "This is to inform you that Local Oakland, Communist Labor Party, with 286 members in good standing, has elected the following 16 comrades to sit in this convention in accordance with the convention call."

Plaintiff's name was No. 12 on this list (p. 152). Witness Ragsdale, a member of Local Oakland, testified that this local had already endorsed the Communist Labor Party and had withdrawn from the Socialist Party (pp. 154–155). It was also established that she held a *membership card* at this time in said Oakland branch of the Communist Labor Party (pp. 190–191).

That plaintiff fully understood the purpose of the meeting is shown by her statement on the witness stand, viz: "It was a convention to formulate the principles and to put in existence the Communist Labor Party, a political party for California, to be a *branch* of the National Communist Labor Party." (P. 309.)

Plaintiff was the very first person to present a report. As chairman of the "Credentials Committee" she presented a report designating those authorized to sit in the convention. (P. 84.) The opening

anthem of this convention, which was originally sung at the said Chicago meeting, was in part as follows:

"Glor-ious, Glor-ious,
We'll make the Bolshevik victorious;
Praise to the plutes, they're making more of us,
While Gene lies in prison for us all.

Long we've waited in the night,
Working for the dawning light,
Now it's coming, all unite,
Rise, Rise, Rise!

All who right and justice seek,
Burst your bonds, no longer weak,
Unite and join the Bolshevik,
Rise, Rise, Rise!"

It will be noted that the foregoing anthem is the very antithesis of the national anthem which is usually sung at conventions and assemblages of American citizens. At the very threshhold it shows the temper and the spirit as well as the purpose of this organization. It contains, not merely language of *incitement*, but even of *exhortation*, to rise and join and making common cause with the Bolshevik or Communist Party of Russia, and to follow their tactics in America in effecting the release of Debs.

Plaintiff was also a member of the "Resolutions Committee" (Folio 128), and signed certain "Resolutions Reported Out By This Committee," (Folios 145 and 147). While it is true that certain of these

resolutions pointed out the advantage of political action, they did not *exclude other means* calculated to promote the ends of the organization. Indeed, one recommended *forcing the release* of class war prisoners (p. 103).

Plaintiff was elected one of two alternate members of the governing body of the organization, to wit, the State Executive Committee (p. 121). Immediately thereafter, the constitution of the state organization was adopted (p. 121).

The first two sections read as follows:

> "Section 1. The name of this organization shall be The Communist Labor Party of California.
>
> "Section 2. It shall be *affiliated with the Communist Labor Party of the U. S.* of America and *subscribe to its Program, Platform, and Constitution.* Through this affiliation it shall be *joined with the Communist International of Moscow.*"

It is unnecessary to quote further from this document, for the language just quoted can mean only one thing and that is that the Communist Labor Party of California affiliated with the Communist Labor Party of the United States and the Communist International of Moscow, whose general history is a matter of common knowledge. The California branch of this party *adopted by reference* the "Program, Platform, and Constitution" of the National Communist Party, and these docu-

ments thereby became a part of its organic institution, just as much as though they were included *haec verba* in its constitution.

"The Communist Labor Party of the United States of America declares itself in full harmony with the revolutionary working class parties of all countries and stands by the principles stated by the Third International formed at Moscow.

* * * * *

With them it also fully realizes the *crying need for an immediate change* in the social system; it realizes that the time for parleying and compromise has passed; and that now it is only the question whether all power remains in the hands of the capitalist or is taken by the working class.

The Communist Labor Party proposes the organization of the workers as a class, the *overthrow* of capitalist rule and the conquest of political power by the workers. The workers organized as the ruling class, shall, through their government make and enforce the laws; they shall own and control land, factories, mills, mines, transportation systems and financial institutions. All power to the workers!

* * * * *

The Communist Labor Party of America declares itself in complete accord with the principles of communism as laid down in the Manifesto of the Third International formed at Moscow. (Rec. p. 172.)

* * * * *

The working class must organize and train

itself for the capture of state power. (Rec. p. 172.)

* * * * *

The Dictatorship of the Proletariat shall transfer private property in the means of production and distribution to the working class government, to be administered by the workers themselves. It shall nationalize the great trusts and financial institutions. It shall abolish capitalist agricultural production.

The present world situation demands that the revolutionary working class movements of all countries shall closely unite.

The most important means of capturing state power for the workers is the action of the masses, proceeding from the place where the workers are gathered together—in the shops and factories. The use of the *political* machinery of the capitalist state for this purpose is only *secondary*.

* * * * *

The years of Socialist activity on the political field have brought no increase of power to the workers. Even the million votes piled up by the Socialist Party without any proportionate representation. *The Supreme Court, which is the only body in any government in the world with power to review legislation passed by the popular representative assembly, would be able to obstruct the will of the working class, even if Congress registered it, which it does not.* The constitution, framed by the capitalist class for the benefit of the capitalist class, can not be

amended in the workers' interest, no matter how large a majority may desire it. (p. 173.)

Not one of the great teachers of scientific Socialism has ever said that it is possible to achieve the Social *Revolution by the ballot.*

* * * * *

In any mention of *revolutionary* industrial unionism in this country, there must be recognized the immense effect upon the American Labor movement of the propaganda and *example* of the INDUSTRIAL WORKERS OF THE WORLD, whose long and *valiant struggles* and heroic sacrifices in the class-war have earned the respect and affection of all workers everywhere. We greet the revolutionary industrial proletariat of America, and *pledge* them *our wholehearted support* and cooperation in their struggles against the capitalist class." (Rec. p. 176.) (Our italics.)

A very brief illustration of the propaganda thus endorsed will be found in the report of Lambert, the secretary of the I. W. W., viz:

"*To the Delegates of the Tenth Convention of the I. W. W.*

FELLOW WORKERS: In submitting the financial report of the Wheatland Hop Pickers' Defense Committee, I believe that it would not be out of place to give some account of the efforts made to effect the release of our imprisoned Fellow Workers. They were tried and sentenced by the Superior Court of Yuba County, State of California, to life imprisonment for

their activities in forcing better working and living conditions in the Agricultural Industry of California. An appeal was taken to the Third District Appellate Court and the lower court was upheld. The case was then carried to the Supreme Court of the state for a rehearing, but a rehearing of the case was refused. Agitation and action on the job was continually carried on by the members of the I. W. W. *and the State of California has already paid eight million dollars per year (the state's own figure) since 1913 for holding Ford and Suhr in prison.* Early in 1915 the case came up on a petition for pardon before the Governor. The matter, as far as Governor Johnson was concerned, lay dormant for over nine months. He then made the statement that he would not consider the cases of Ford and Suhr further until sabotage and threats of sabotage were stopped. It is not generally known that more than forty members of the I. W. W. languish in prisons of California, serving sentences ranging from one to six years, for their activities, nor that two of our members have been killed in the fight with the employing class of California for the freedom of Ford and Suhr. These things have not dampened our spirits in the least. Nor have they altered our determination to keep *banging away at them* until either Ford and Suhr are free, or that we are all in prison with them. We do not want any money (fol. 310) from the General Organization; we can get along without that, but what we do want is 'Men, and lots of men, who are willing to help us *battle* the employing class of California by

any and all *means* at our command, for the freedom of Richard Ford and Herman Suhr.'

Yours for the O. B. U.,

C. L. Lambert,
Secretary."
(Our italics.) (p. 231).

The record shows that the example of this latter organization, thus endorsed, included the use of incendiary bombs (265), burning of barns and hay stacks (266), poisoning of cattle with cyanide of potassium and injuring fellow workers who would not join them by putting lye in their shoes (271), crop destruction by sowing noxious weeds and destruction of machinery by use of emery dust (228). To meet this situation and as a matter of self-preservation, the State of California enacted its Criminal Syndicalism Law.

That plaintiff's advocacy of the example of the I. W. W. was not merely constructive, and that she was in entire sympathy with the I. W. W. and familiar with its leaders and practices, is indicated by the following facts:

A former member of the I. W. W. testified that he knew her, and had seen her several times in San Francisco at I. W. W. headquarters as early as July, 1918 (p. 274). She was present at I. W. W. headquarters at the time San Francisco police officers raided the place and carried Diamond and one, Stredwick, off to jail (p 281). She also discussed

with Diamond the circulation of defense letters on behalf of the I. W. W. prisoners in Sacramento (p. 281–2). She admitted that she corresponded with Esmond, an I. W. W. in San Quentin and Fort Leavenworth prisons (p. 315) and also with Stredwick (p. 316), above alluded to.

That she not only assisted in organizing, but actually became a member of Communist Labor Party is shown by the testimony of the secretary of the Oakland Local branch.

But her membership even up to the time of trial is conclusively established by her bold admission on the witness stand, viz:

> **"Q. You are a member of the Communist Labor Party?**
> **A. I am."** (p. 310.)

This alone is sufficient evidence as to the main issue of membership. It was not necessary for the state to prove that plaintiff herself committed any other act. As said by this court in

Aikens vs. *Wisconsin*, 195 U. S. 194,

construing a statute prohibiting a combination of two or more persons for the purpose of maliciously injuring another in his reputation, trade or business:

> "The statute is directed against a series of acts, and the acts of several, the acts of combining, with intent to do other acts. *'The very plot is an act in itself.'* * * * No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most

innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law." (Our italics.)

"The gist of the offense is the criminal confederacy, and it has been stated that if the word 'conspiracy' were substituted for the words 'organization, society, group or assemblage,' the meaning of the law would be in no wise changed. To charge persons with being members of a society of persons organized to advocate, teach or aid and abet criminal syndicalism is in effect to charge them with conspiring to advocate, teach or aid and abet criminal syndicalism. Such conspiracy is complete *without* the commission of any overt act.

* * * * *

"It is not the character of the system to be established, but the means advocated and employed by the conspiracy in effecting its ultimate object, that is material in the prosecution, for, it is said, however beneficient may be the object of an organization, the conspiracy is criminal if it advocates the accomplishment thereof by unlawful acts of force and violence or unlawful methods of terrorism."

23 California Jurisprudence, pp. 1110–1112.

That plaintiff in error did not withdraw from this party after it adopted the platform of the National Communist Party and endorsed the example and

conduct of the I. W. W., is shown by her above admission and by the testimony of the secretary of the convention, Taylor, to the effect that she was present at the second meeting of the Executive Committee in San Jose about December 9, 1919 (p. 125), and attended another meeting "about a week ago" (p. 128). In other words, plaintiff did not withdraw even after her indictment and arrest, but was still a member at the time of the trial. Police Inspector Kyle saw her on five different occasions at Loring Hall, the C. L. P. headquarters—November 17, 18 and 19, some time in December and January 5th. (Folio 277.) This same witness testified that the police took a "ton" of literature and printed propaganda from these same headquarters (281), numerous excerpts of which are in the record, showing the same to be of the most inflammatory, revolutionary and syndicalistic nature. Among these are the following to which we shall, for sake of brevity, refer the court to the record for an illuminating lesson as to nature and evils of syndicalism:

"Syndicalism" by Ford & Foster, pp. 216–219.
"Sabotage" by Walker C. Smith, pp. 250 to 254.
"Sabotage" by Emile Pouget, pp. 246–249.
"The Revolutionary I. W. W." by Perry, pp. 233–234.
"The I. W. W. Its History, Structure and Methods," by Vincent St. John, p. 234.
"The General Strike," by William D. Haywood, pp. 243–245.

"Sabotage," by Elizabeth Gurley Flynn, pp. 272–274.

We submit that the record abundantly establishes the two principal issues of fact, to wit, (1) membership and (2) the criminal character of the organization. In other words, the foregoing statement which is the mere sketching of the record, shows that plaintiff was one of the most active organizers and members of the Communist Labor Party of California, which was affiliated with the Communist Labor Party of the United States, and was at the same time a member of Local Oakland, the Communist Labor Party from which she was a delegate to the convention which formed the state party; that her activities in connection therewith covered a period of at least a year prior to the organization of the state branch and continued, according to her own admission, right up to and including the time of the trial; in short she was not an innocent bystander or passive spectator, but was one of the *leaders* in this movement in the State of California and contributed much strength and impetus to the movement by reason of her influence and prestige.

The Information—Its Sufficiency—No Denial of Due Process.

In plaintiff's Point I, in the brief filed immediately before the first hearing in this court,

Hodgson vs. *Vermont*, 168 U. S. 262,

is cited as authority for the proposition that the

generality of the information denies due process. It is held in that case that the information which an accused must receive "is that which will acquaint him of the *essential* particulars of the offense * * *." In the instant case the vice of the crime was not the name given to the organization, but rather its character, purposes and the things for which it stood. The information did describe the organization by giving its essential characteristics, to wit, "an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism," the latter term having been specifically defined by the statute.

In the *Hodgson* case the accusation did *not* state the *name* of the person to whom the liquor was alleged to have been sold, nor the *place* where it was so sold. This court said:

> "The prescribed form covers the offense in the exact and easily understood language of the *statute which creates* it. This is sufficient * * * It is not an *ancient* crime which has been, from time *immemorial, clothed in special terms* which, by long use, have become the most apt and definite ones to describe the exact crime. The statute sometimes prescribes the punishment of a common law crime without defining it, or creates an offense and prescribes no form for an information. In such cases it is well held that the common law requirements in charging it must be met * * * But it is sufficient to charge a statutory offense in the terms of the statute. * * *"

The California Criminal Syndicalism Act is a statutory offense, unknown to the common law, of recent enactment and designed to meet new conditions. Mention is made in the case just cited that more particular information was subsequently furnished to the accused upon a bill of particulars.

In any consideration of what constitutes due process with respect to the administration of justice in criminal cases in California regard must be had to an important part of its organic law providing that

> "No judgment shall be set aside * * * for error as to any matter of pleading, or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."
>
> California constitution, Sec. 4½, Art. VI.

It is thereby made the duty of the appellate tribunals in California to abstain from reversing cases for procedural errors that do not result in actual injury or prejudice to the accused. The record here shows that the District Court of Appeal of California following the mandate of its constitution, after an examination of the case, determined that the defendant in the trial court did not suffer any prejudice from the circumstance that the name of the organization was not specified (p. 4, fol. 6). The said court found that the accused had been fully advised upon a long *voir dire* exam-

ination of the jurors, which part of the record has not been brought up to this court, and in the opening statement of the district attorney, of the organization she was charged with having assisted in organizing and becoming a member thereof (p. 4, fol. 6).

But in addition to this and long before the trial she had been apprised not only of the nature of the accusation but as well much of the evidence supporting it. The proceeding against her was not by indictment but by "information." In California an information can only be filed by the district attorney after a "preliminary examination" or trial before a magistrate and his determination that there is sufficient cause to believe the defendant guilty of a public offense. (Secs. 858 to 883, both inclusive, California Penal Code.)

Upon such preliminary examination the defendant therein has the opportunity of hearing all the evidence produced, cross-examining witnesses and introducing a defense if desired. The accused by reason of this procedure is necessarily advised of much, if not all, of the state's case in advance of the filing of the information and trial in the superior court. Not only must it be presumed that the accused in the instant case was advised of the nature of the charge against her, but it actually appears from the record before this court that she knew what constituted the real substance of the state's case. The principal portion of the record connect-

ing plaintiff in error with the Communist Labor Party is found in the testimony of her fellow member, Reed (pp. 151–194), who did not appear as a witness at the trial in the superior court but whose *deposition*, given at the preliminary examination, was read, as provided by law in case of missing witnesses (p. 150, fol. 208). There was no objection to this witness' testimony being received by deposition. As the record shows the information was filed December 30, 1919, and as this deposition given at the preliminary examination must have preceded said information, it thus appears that at least a month transpired between the giving of said deposition and the trial which commenced January 28, 1920, thereby allowing the accused ample time to prepare her defense. The record is devoid of any showing that she at any time was surprised with respect to the nature of the state's case, nor did she at any time request a continuance upon the ground of such surprise. Indeed, plaintiff at no time denied her membership in the Oakland branch of the California Communist Labor Party, which was affiliated with and subscribed to the program and platform of the Communist Labor Party of the United States. That is to say, the Oakland branch was part and parcel of the national organization and devoted to the same principles and purposes.

There is no merit to the suggestion that former jeopardy could not be established under such indict-

ment. The same point was urged in the first case under this statute, to wit:

> *People* vs. *Malley,* 49 Cal. App. 597 at 608 (194 Pac. 48),

where the court said:

> "If he should be again prosecuted for the offense, he may plead his conviction in the manner provided for in the code, and establish the identity of the cases by evidence, the burden being upon him."

Citing:

> *People* vs. *Faust,* 113 Cal. 172, 45 Pac. 261; *People* vs. *Burke,* 18 Cal. App. 72, 122 Pac. 435.

In other words, in California, a person is not confined to the judgment roll in establishing a plea of former jeopardy, but may prove it by evidence *aliunde.*

"Due process of law," as here used, refers to the law of the land in each state, deriving its authority from the inherent and reserved powers of the state, exerted within the limits of the fundamental principles of liberty and justice underlying our civil and political institutions. What is due process of law in the respective states is regulated and determined by the law of each state, and this amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations enforced, provided

the method of procedure adopted for these purposes gives reasonable notice and affords a fair opportunity to be heard before the issues are decided.

Hallinger vs. *Davis,* 146 U. S. 320;
U. S. vs. *Cruikshank,* 92 U. S. 542;
Hurtado vs. *California,* 110 U. S. 535.

Law, in its regular course of administration through the courts of justice, is due process, and when secured by the law of the state, the constitutional requisite is satisfied.

Caldwell vs. *Texas,* 137 U. S. 697;
Duncan vs. *Missouri,* 152 U. S. 382;
Munn vs. *Illinois,* 94 U. S. 123.

A decision upon a matter of practice under the state procedure does not draw in question any right under this provision.

Thorington vs. *Montgomery,* 147 U. S. 492;
Ballard vs. *Hunter,* 204 U. S. 258;
Cross vs. *North Carolina,* 132 U. S. 140.

Evidence of Activities of Others Was Received for Sole Purpose of Determining Character of Organization and so Limited by Instruction of Court.

Plaintiff's Point II, to the effect that the verdict was based on acts occurring prior to the enactment of the law, is based upon a misconception of the facts. The record shows that plaintiff in error was one of the most active persons present at the convention held in Loring Hall, Oakland, California,

November 9, 1919, which resulted in the formation of the "Communist Labor Party of California," and which adopted as its platform the platform of the Communist Labor Party of the United States, which platform endorsed the propaganda and example of the I. W. W., further declaring:

> "We greet the revolutionary proletariat of America, and *pledge* them our wholehearted *support* * * *." (P. 176.)

As a keynote to the Oakland convention, "one of the speakers praised the I. W. W. * * *." (P. 98.)

Evidence of and concerning the propaganda and example of the I. W. W. and its activities was introduced for the purpose of showing the character and the purposes of the Communist Labor Party of California, this being one of the essential facts in issue. Such evidence was competent under

Debs vs. *U. S.*, 214 U. S. 211;
Schenck vs. *U. S.*, 249 U. S. 47;
Baer vs. *U. S.*, 249 U. S. 47;
Hitchman Co. vs. *Mitchel*, 245 U. S. 229.

Thus, in the *Debs* case the the criminal records of certain radicals whom he extolled were received in evidence, this court saying:

> "* * * It was proper to show what those grounds were in order to show what he was talking about, to explain the true import of his expression of sympathy and to throw light on the intent of the address * * *."

The defense in the instant case was not so much of the plaintiff as of her *party*. It was important to determine what this party advocated. This evidence was not introduced to prove her guilty of prior acts committed by other syndicalists. Nor was it so considered by the jury.

The court gave a *limiting* instruction, viz:

"Evidence has been admitted in this case of statements, acts and declarations of persons other than the defendant, and not made and done in the presence of the defendant, and of printed matter purporting to be printed matter of the I. W. W. and of the Communist Labor Party, or circulated or publicly displayed by the I. W. W. and by the Communist Labor Party, and taken from places and at times at which the defendant was not present, and which was not directly connected with the defendant, and which the evidence does not show was circulated, printed, or publicly displayed with her acquiescense or consent. Evidence has also been admitted of other objects which are not directly connected with the defendant.

The court instructs you that *such evidence was admitted for but one purpose*, and is to be considered by you for that one purpose only, and that is *to determine the character of the organization* of which it is claimed the defendant was a member, or which it is claimed she organized or assisted in organizing, namely, whether or not it was an organization, society, group or assemblage of persons organized or assembled to advocate, teach, or aid and abet criminal syndicalism,

as defined in the statute from which I have read to you." (P. 46.)

Plaintiff Not Penalized for Subsequent Acts of Others, but for Her Continued Connection With Proscribed Organization.

Plaintiff's Point III, to the effect that she was punished for the subsequent acts of other members of her party is refuted by the facts. The record shows that she was one of the most active founders and organizers of the Communist Labor Party, serving on the credentials and resolutions committee at the convention wherein it was organized. It is true that certain resolutions proposed by her recommended the advantages of political action but they did not exclude other and more direct means. When the convention adopted the platform of the Communist Labor Party of the United States, which decried the ballot as a means of accomplishing its aims and extolled and recommended the tactics used by the I. W. W., she could have *withdrawn* from the convention. But this she did not do. On the contrary, she continued for months thereafter to serve as an alternate member of the state executive committee and even at the time of the trial admitted that she was still a member of this organization.

Knowledge and Intent.

Plaintiff's Point IV takes exception to the comment of the California court that it was not concerned with any question as to whether or not plain-

tiff realized that she was giving herself over to forms and expressions of disloyalty and lending her influence to an organization whose purposes savored of treason, saying "it is one of the conclusive presumptions of our law that a guilty intent is presumed from the deliberate commission of an unlawful act. (C. C. P., Sec. 1962.)"

This is fully explained in a later decision of our California Supreme Court involving this act, in

People vs. *McClennegen,* 69 Cal. Dec. 195, at 210 and 211; 234 Pac. 91.

"Unquestionably the legislature had the power to provide that any person who joins an organization organized for unlawful purposes, whether such person is or is not aware of the unlawful purpose, is guilty of an offense."

"Subdivision 5, of the same section, defines knowingly, as follows:

'The word "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission;' * * *"

"The commission of various acts are made punishable under our criminal procedure, even though the doer be ignorant of the fact that the doing of the act constitutes an offense. A mistake of fact, or a want of intent, is not in every case a sufficient defense for the violation of a criminal statute. Statutes enacted for the protection of public morals, public health and the public peace and safety are apt illustrations of

the rule just announced. (*People* vs. *Ratz*, 115 Cal. 132; *People* vs. *Griffin*, 117 Cal. 583; *People* vs. *Sheffield*, 9 Cal. App. 130; *State* vs. *Hennessy*, 195 Pac. 211, and cases cited.) The latter case quotes the following extract from 8 R. C. L., page 62, as a correct statement of law:

'* * * The doing of the inhibited act constitutes the crime, and the *moral turpitude or purity of the motive by which it was prompted and knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt.* The only fact to be determined in these cases is whether the defendant did the act. In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute.' (See, also, 7 Cal. Jur. 852; *In re Ahart*, 172 Cal. 762; *People* vs. *O'Brien*, 96 Cal. 171; 16 C. J. 76.)

There is much force in the observation made by Mr. Presiding Justice Finch in the case of *People* vs. *Flanagan*, *supra*, to the effect that the average man does not ordinarily become affiliated with political or industrial organizations which may affect national welfare without informing himself as to the cardinal principles of such organization. Political and economic experiences justify the observation. The general principles and primary purposes of all organizations whether political, industrial, benevolent, fraternal or social are quite generally known to the public. We agree with what was said in the *Flanagan* case that: 'The intent of the defendants must be determined from their voluntary

connection with the conspiracy, viewed in the light of the circumstances which they knew or ought to have known. * * * '

* * * * *

A consideration of the entire subject leads us to the conclusion that proof of the act of joining an organization shown to be such as the statute denounces is a sufficient showing of knowledge of the purposes of the organization. *An accused may meet this showing by proof that he was ignorant of its criminal purposes or that he was induced by false or fraudulent representations to become a member of said organization and was ignorant of its purposes.* Of course, if he remained a member and became active in teaching and advocating its doctrines, as was done in the instant case, such conduct would itself be evidence of knowledge of its evil purposes."

Character of Communist Labor Party Is Matter of Common Knowledge, But Plaintiff Was Exceptionally Versed in Its Tenets.

Plaintiff's Point V that defendant could not know at the time of joining the organization whether the action of other persons would give it an illegal character is merely a moot and abstract question. The record shows that a year prior to the organization of the Communist Labor Party in California plaintiff was in sympathy with the radical Socialists and was active in the election of radical delegates, who later organized the Communist Labor Party of the United States. Then after the plat-

form of this party had been promulgated and given wide publicity plaintiff took a leading part in establishing a local and state branch at Oakland. In other words, the principles and program of the party were established prior to the actual formation of the local organizations in California. She was not therefore merely engaged in founding an organization whose purposes and principles were to be formulated in the future, but rather in joining and affiliating with and promoting the expansion of an organization whose program was already well known.

Freedom of Speech Not Abridged by Legislation Prohibiting Teachings, Publications and Propaganda Tending to Imperil or Subvert the Government.

Plaintiff's Points VI, VII, VIII and IX may be summarized under the general objection that the statute and its application in this case infringes upon the right of free assemblage and free speech. This was treated in our brief heretofore filed herein, wherein we cited authorities to the proposition that the right of free speech and assembly does not include unlicensed speech or the right of assembly for every purpose, and that there is no constitutional provision guaranteeing any set of men the right to assemble and advocate the overthrow of the government by force or violence. In addition to the authorities there cited we desire to cite the *Gitlow* case, *supra,* and more particularly the major-

ity opinion of this court which is the most recent expression as well as a complete summary of the law on this subject. The opinion of the court, delivered by Mr. Justice Sanford, reads in part as follows:

> "And, for yet more imperative reasons, a state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional state. Fr edom of speech and press, said Story, (*supra*) does not protect disturbances to the public peace or the *attempt* to *subvert* the government. It does not protect publications or *teachings which tend to subvert or imperil the government* or to impede or hinder it in the performance of its governmental duties. *State* vs. *Holm, supra,* p. 275. It does not protect publications *prompting the overthrow of government by force;* the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the state. *People* vs. *Most, supra,* pp. 431, 432. And a state may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several states, by violence or other unlawful means. *People* vs. *Lloyd*, 304 Ill. 23, 34. See also, *State* vs. *Tachin,* 92 N. J. L. 269, 274; and *People* vs. *Steelik,* 187 Cal. 361, 375. In short this freedom does not deprive a state of the primary and essential right of self preservation; which, so

long as human governments endure, they can not be denied." (Our italics.)

It is noteworthy that this court cited among other cases as authority for its conclusions the case of *People* vs. *Steelik*, the leading case by our California Supreme Court upon the questions here involved.

Gitlow was convicted of printing and circulating the "Left Wing Manifesto, and also a Communist program and a program of the Left Wing." The subject-matter of the Manifesto which is subjoined as a footnote to the Gitlow case is substantially identical with that of the Program, Platform and Constitution hereinabove referred to as having been adopted by the Communist Labor Party, of which plaintiff admitted she was a member. But her organization went much further, for it declared itself "in *complete accord* with the principles of Communism, as laid down in the Manifesto of the Third International formed at Moscow," declaring that the working class "must organize" and "train itself for the *capture* of state power;" that a "Dictatorship of the Proletariat" should be created; that "the revolutionary working class movement of all countries shall closely unite"; that the "most important means of capturing state power * * * is the action of the masses"; and that the "use of political machinery * * * for this purpose is *only secondary.*" (pp. 172–173.) It further and in effect denounced this court as a tool of the capitalist

class and as having arbitrarily predetermined to obstruct and defeat the accomplishment of any radical legislation which might be adopted by congress. The Communist Labor Party also went further than the Manifesto condemned in the *Gitlow* case in recognizing and extolling "the propaganda and example of the Industrial Workers of the World * * *." Instead of disavowing the activities of this organization which are a matter of common knowledge, it classed the same as "valiant struggles and heroic sacrifices in the *class war.*" Not content with this, it proceeded to "*pledge them our whole-hearted support* and cooperation * * *."

Further and in addition to the above this organization maintained on display at its headquarters at Loring Hall, Oakland, and sold and distributed a large quantity of syndicalistic literature (p. 76, fol. 115; p. 78), including the Manifesto, radical newspapers and about a ton of syndicalistic literature hereinabove referred to in our statement of facts.

Statute Does Not Deny Equal Protection of the Laws.

In Point X plaintiff contends that the statute denies equal protection because it applies only to those who commit the acts in question for the purpose of effecting a *change* and does not include those who do the same things to *maintain* present conditions.

The equal protection of the laws is secured where the laws operate on all alike and do not subject the

individual to an arbitrary exercise of the powers of government.

Duncan vs. *Missouri*, 152 U. S. 382;
Atchison, etc. R. Co. vs. *Mathews*, 174 U. S. 104.

As said in *State* vs. *Hennessy*, 195 Pac. 211, considering a similar act:

> "The act is general in its terms and provides that 'whoever' shall do the things there prohibited shall be guilty of a felony. Under this language anyone, no matter what his business association or professional calling might be, who did the things prohibited by the act, would be subject to its provisions."

Says the Oregon Supreme Court in

State vs. *Laundry*, 204 Pac. 958:

> "The syndicalism statute is not class legislation. It affects all alike. It does not discriminate against some or favor others."

Conclusion.

It is true that the record does not show that this defendant threw bombs, fired hay stacks, or preached on street corners inciting men to assassinate the President, governors and other officials of the nation and this commonwealth, but this was not necessary. The charge was that she assisted in *organizing and became a member of* a society or group of persons organized to advocate, teach and aid criminal syndicalism, which is defined as that doctrine advocating the commission of crime and unlawful acts of

force and unlawful methods of terrorism as a means of accomplishing a change in the present industrial and political structure. It might be more tersely expressed as *revolution by direct action*. History affords several notable examples. One is the recent revolution in Russia. Another, as to which the lapse of a century renders a perspective unbefogged by current political discussion, is the French Revolution. As one concludes his reading of Guizot's account of that memorable human cataclysm and takes up the record in this case, he can not avoid the conclusion that the story here presented might be well *transposed* and substituted for the account of the first period of that revolution. We see the revolution in the process of formation, the intellectuals of that period were "the brains," and the vicious, malignant and Nihilistic element, "the hands."

In the second period the revolution reaches its crest under Robespierre, the supreme dictator. This period is called the "Reign of Terror." Here we see one of the intellectuals leading the mob. Counsel for appellant argue that the record does not show that *defendant* committed any act of violence or sabotage. History does not record that Robespierre personally shot, stabbed or killed any person. He was a philosopher; he professed to ardently love and to be an exponent of "virtue." The good of the masses and the establishment of the Republic, he asserted, were his sole ambition. Yet he was one

of the greatest butchers in history and in contemporary parlance the guillotine was called "Robespierre's razor." The violence and bloodshed of the French Revolution accomplished nothing. In a few years it was succeeded by the Empire and a rule more autocratic than that of Louis XVI. The freedom of French citizenry was really established just before the "Reign of Terror" during the ascendancy of Lafayette and Mirabeau, by *due process of law*, through legislation enacted by the first representative parliament in France, known as the Constituent Assembly, 1789–1791. As Guizot declares:

> "It gave France equality before the law, national representation, and that government of the country by the country which has become the watchword of every free people."

In other words, all the good of the French Revolution proceeeded not from violence and mob action, but through the orderly processes of law and legislation.

The foregoing suggests the reason for the enactment of the Criminal Syndicalism Act as well as its spirit and purpose. It was designed not to punish the leaders of a revolution *after* the evil had been done, but rather to provide a means of forestalling it in its inception.

Respectfully submitted.

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APPENDIX.

[NOTE.—*The following is taken from the latest and most comprehensive textbook discussion and review of the California Criminal Syndicalism Act found in volume 23, California Jurisprudence, pages 1103 to 1133; which is an encyclopedic summary of the law and practice of the State of California, edited by William M. McKinney, editor, Federal Statutes Annotated, Ruling Case Law, etc. The article, excerpts from which are hereinbelow quoted, has been written since the argument of this case last October and it is herewith submitted for such light and assistance as it may afford the court. The authorities cited as footnotes in the original are inserted in parentheses in their proper places in the text quoted below.*]

"Sec. 1. Definitions—Scope of Article. The term 'criminal syndicalism' is defined by statute as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change. (Stats. 1919, p. 281.) It has been said that criminal syndicalism means, among other things, direct action and sabotage. (*People* vs. *Lesse*, 199 Pac. 46.) But as indicated by the statutory definition it is *not necessary to constitute this offense that there be acts of violence committed;* mere teaching is sufficient, the acts of violence being merely evidentiary as tending to show the character of the organization in question and

that it does teach and advocate such methods. (*People* vs. *Wright*, 226 Pac. 952.)"

"Sec. 2. Legislation Proscribing and Constitutionality Thereof.—"

"The act was passed at a time when the practice of sabotage and other unlawful methods of terrorism was deemed a growing menace to law and order in the state. So insistent was the danger that the legislature departed from its usual course and provided that the act should have immediate effect."

"The legislature has power to pass all needful penal laws, so long as they bear with equal weight upon all in like situation or of the same class. (*People* vs. *McClennegen*, 234 Pac. 91.) While some of the acts prohibited might have been punishable as constructive treason at common law, the legislature is not precluded from providing for their punishment by the constitutional definitions of treason, as such definitions merely limit the number of offenses punishable as treason at common law. (*People* vs. *Steelik*, 203 Pac. 78.) The statute does not violate the right of free speech as guaranteed by the federal and state constitutions since that right does not include the right to advocate the destruction or overthrow of government or the criminal destruction of property. (*People* vs. *Steelik*, 203 Pac. 78.) Nor does the absence of any definition of 'crime,' 'unlawful method of terrorism,' 'change in industrial ownership or control,' and the like, render the statute void for indefiniteness since their meanings may be obtained from the decisions and the code provisions. (*People* vs. *Steelik*, 203 Pac. 78.) The act is not unconstitutional because it penalizes certain

acts done to accomplish an industrial or political change and does not penalize the same acts if done for the purpose of maintaining and perpetuating the same industrial or political condition. (*People* vs. *Wieler,* 204 Pac. 410.)"

"Sec. 7. Organizing or Joining Association.—Any person who 'organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism,' is guilty of a felony. (Stats. 1919, p. 281.) The gist of the offense is the criminal confederacy, and it has been stated that if the word 'conspiracy' were substituted for the words 'organization, society, group or assemblage,' the meaning of the law would be in no wise changed. (*People* vs. *Steelik,* 203 Pac. 78.) To charge persons with being members of a society of persons organized to advocate, teach or aid and abet criminal syndicalism is in effect to charge them with conspiring to advocate, teach or aid and abet criminal syndicalism. (*People* vs. *McClennegen,* 234 Pac. 91.) Such conspiracy is complete *without* the commission of any overt act."

"It is not the character of the system to be established, but the means advocated and employed by the conspiracy in effecting its ultimate object, that is material in the prosecution, for, it is said, however beneficent may be the object of an organization, the conspiracy is criminal if it advocates the accomplishment thereof by unlawful acts of force and violence or unlawful methods of terrorism. (*People* vs. *Flanagan,* 223 Pac. 1014.)"

"III. Indictment and Information."

"Sec. 11. Organizing or Joining Forbidden Association.—The offense of organizing or belonging to an organization or society organized or assembled to advocate, teach or aid and abet criminal syndicalism may be charged in the language of the statute, since the acts therein denounced are sufficiently described by the language itself to make it perfectly clear what it intended. (*People* vs. *Casdorf*, 212 Pac. 237.) It is not necessary, however, that the language of the statute be literally followed. It is sufficient, for example, to allege that the defendant 'did become and remain' a member of a syndicalistic organization, since by so doing he 'is' a member within the intent and meaning of the Syndicalism Act. (*People* vs. *Thornton*, 219 Pac. 1020.) In charging one with organizing a prohibited society, it is not necessary to name those induced to join, as this element is not mentioned in the statute. (*People* vs. *Wieler*, 204 Pac. 410.) And it has been held that the name of the organization need not be stated (*People* vs. *Wieler*, 204 Pac. 410); in any event a failure to do so is not fatal where the offense is charged in general terms and the accused is advised at the beginning of the trial as to the particular organization intended. (*People* vs. *Taylor*, 203 Pac. 85.)"

"Sec. 5. Advocating Industrial or Political Revolution.—The mere advocacy of a change in industrial ownership or political change to be accomplished by lawful means is not a crime. (*People* vs. *Eaton*, 213 Pac. 275.) The inhabitants of the United States have both individually and collectively the right to

advocate peaceable changes in our constitution, laws or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis. (*In re Hartman,* 188 Pac. 548.) But it is a felony for any person to advocate the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change, or for anyone to justify the commission of such unlawful acts with intent to approve, advocate or further the doctrine of criminal syndicalism."

"V. Evidence."

"Sec. 21. Organizing or Joining Association.— It has been held that in a prosecution for organizing or joining a prohibited association, the criminal organization constitutes the *corpus delicti,* and proof of membership therein serves only to connect the accused with the crime. (*People* vs. *La Rue,* 216 Pac. 627.) Accordingly, where the *corpus delicti* is established by the testimony of witnesses other than the accused, an admission of the accused, that he was a member of the organization in question, is sufficient proof of membership. (*People* vs. *La Rue,* 216 Pac. 627.)"

"Sec. 22. Criminal Character of Organization.— In a prosecution for membership in an organization which advocates, teaches or aids and abets criminal syndicalism, the criminal character of the organization is a question always to be determined (*People* vs. *Erickson,* 226 Pac. 637), and must be proved.

(*People* vs. *Steelik*, 203 Pac. 78.) The evidence is sufficient in this respect where a quantity of the literature of the organization was found at the place where the accused was arrested, and such literature advocated criminal syndicalism. (*People* vs. *Powell*, 236 Pac. 311.)

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SUPREME COURT OF THE UNITED STATES.

No. 3.—October Term, 1926.

Charlotte Anita Whitney, Plaintiff in Error, *vs.* The People of the State of California.	In Error to the District Court of Appeal, First Appellate District, Division One, of the State of California.

[May 16, 1927.]

Mr. Justice Sanford delivered the opinion of the Court.

By a criminal information filed in the Superior Court of Alameda County, California, the plaintiff in error was charged, in five counts, with violations of the Criminal Syndicalism Act of that State. Statutes, 1919, c. 188, p. 281. She was tried, convicted on the first count, and sentenced to imprisonment. The judgment was affirmed by the District Court of Appeal. 57 Cal. App. 449. Her petition to have the case heard by the Supreme Court[1] was denied. *Ib.* 453. And the case was brought here on a writ of error which was allowed by the Presiding Justice of the Court of Appeal, the highest court of the State in which a decision could be had. Jud. Code, § 237.

On the first hearing in this Court, the writ of error was dismissed for want of jurisdiction. 269 U. S. 530. Thereafter, a petition for rehearing was granted, *Ib.* 538; and the case was again heard and reargued both as to the jurisdiction and the merits.

The pertinent provisions of the Criminal Syndicalism Act are:

"Section 1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of ac-

[1] Statutes, 1919, c. 58, p. 88.